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*Charles Francis Adams.*

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John Quincy Adams.

1853.

# HISTORY

OF THE

# ENGLISH LAW.

VOL. I.

John Adams

# HISTORY

OF THE

# ENGLISH LAW,

FROM THE

## TIME of the SAXONS,

TO THE

## END of the REIGN of PHILIP and MARY.

By JOHN REEVES, Esq.
BARRISTER AT LAW.

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THE SECOND EDITION.

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IN FOUR VOLUMES.

VOL. I.

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# PREFACE.

THE Hiſtory which I now preſume to offer to the profeſſion of the law, is an attempt to inveſtigate and diſcover the firſt principles of that complicated ſyſtem which we are daily diſcuſſing.

IT has happened to the law as to other productions of human invention, particularly thoſe which are cloſely connected with the tranſactions of mankind, that a ſeries of years has gradually wrought ſuch changes, as to render many parts of it obſolete; ſo that the juriſprudence of one age has become the object of mere hiſtoric remembrance in another. Of the numerous volumes that compoſe a lawyer's library, how many are conſigned to oblivion by the revolutions in opinions and practice; and what a ſmall part of thoſe which are ſtill conſidered as in uſe, is neceſſary for the purpoſes of common buſineſs! Notwithſtanding, therefore, the multitude of Books, the reſearches of a lawyer are confined to writers of a certain period. According to the preſent courſe of ſtudy, very few indeed look further than *Coke* and *Plowden*. Upon the ſame ſcale of inquiry, the *Year-Books* are conſidered rather in the light of antiquities; and *Glanville*, *Bracton*, and *Fleta*, as no longer a part of our law.

IT

It is in such a state of our jurisprudence that a history of the causes and steps by which these revolutions in legal learning have been effected, becomes curious and useful. But, notwithstanding the inquisitive spirit of the present age has given birth to histories of various sciences, we have nothing of this kind upon our law, except Sir Matthew Hale's *History of the Common Law*, published from a posthumous manuscript at the beginning of the present century. There have not, however, been wanting historical discourses, which have incidentally, and in a popular way, examined the progress of certain branches of the law, and during certain periods; such as those of *Bacon*, *Sullivan*, *Dalrymple*, *Henry*, and others.

Sir Matthew Hale, as a writer upon English law, possesses a reputation which can neither be increased nor diminished by any thing that may be said of his History. We may therefore freely observe, that it is only an imperfect sketch, containing nothing very important nor very new. What seemed most to be expected, namely, an account of the changes made in the rules and maxims of the law, is very lightly touched. In short, the early period to which this work is confined, and the cursory way in which that period is treated, scarcely serve to give a taste of what a history of the law might be.

Sir William Blackstone, though in a smaller compass, has given a plan of a much better

better hiſtory than the former; and if the one excited a wiſh for ſomething more complete, the other ſeems to have traced out a ſcheme upon which it might be executed. It was the chapter at the end of the *Commentaries* which perſuaded me of the utility of ſuch a work, if filled up with ſome minuteneſs upon the outline there drawn. It ſeemed, that after a peruſal of that excellent performance, the ſtudent's curioſity is naturally led to enquire further into the origin of the law, with its progreſs to the ſtate at which it is now arrived.

The plan on which I have purſued this attempt at a Hiſtory of our Law, is wholly new. I found that modern writers, in diſcourſing of the antient law, were too apt to ſpeak in modern terms, and generally with a reference to ſome modern uſage. Hence it followed, that what they adduced was too often diſtorted and miſrepreſented, with a view of diſplaying, and accounting for, certain coincidences in the law at different periods. As this had a tendency to produce very great miſtakes, it appeared to me, that, in order to have a right conception of our old juriſprudence, it would be neceſſary to forget for a while every alteration which had been made ſince, to enter upon it with a mind wholly unprejudiced, and to peruſe it with the ſame attention that is beſtowed on a ſyſtem of modern law. The law of the time would then be learned in the language of the time, untinctured with new opinions; and when that was clearly underſtood, the

the alterations made therein in ſubſequent periods might be deduced, and exhibited to the mind of a modern juriſt in the true colours in which they appeared to perſons who lived in thoſe reſpective periods. Upon the ſame reaſoning, it appeared to me, that if our ſtatutes, and the interpretation of them, with the variations that have happened in the maxims, rules, and doctrines of the law, were preſented to the reader in the order in which they ſucceſſively originated; ſuch a hiſtory, from the beginning of our earlieſt memorials down to the preſent time, would not only convey a juſt and complete account of our whole law as it ſtands at this day, but place many parts of it in a new and more advantageous light, than could be derived from any inſtitutional ſyſtem; in proportion as an arrangement conformable with the nature of the ſubject, ſurpaſſes one that is merely artificial.

The following volumes are written upon this idea; and being, in that view, an introductory work, they will, I truſt, be as intelligible to a perſon unacquainted with law-books, as to thoſe of the profeſſion. It was partly with this deſign that I have contented myſelf with a ſimple narrative, making few alluſions to what the law became in later times, but leaving that to be mentioned in its proper place. Many inferences and diſcuſſions which ſeem to be ſuggeſted by our antient laws have not entirely eſcaped me; but are reſerved for a place to which, agreeably with the plan of this Hiſtory, I thought them better adapted. Every

one

one who looks into our old law, feels a ſtrong propenſity for remarking on the changes it has ſince undergone; but when the ſeveral ſteps which led to thoſe changes are traced in a continued narrative down to the preſent time, ſuch obſervations would be premature, unneceſſary, and irkſome.

My object being juriſprudence, and not antiquities, I have confined my reſearches to certain printed books of eſtabliſhed reputation and authority, where alone I could hope to find the juridical hiſtory of the times in which they were written. It may not, perhaps, be unſatisfactory to the reader, who knows what reſpect is due to the venerable remains of our ancient law, to be told, that the whole of Glanville, and what ſeemed to be the moſt intereſting part of Bracton, is incorporated into this work.

A few obſervations may be neceſſary to prevent the reader being diſappointed in that part of the following work which treats of the ſtatutes. The old ſtatutes have long been conſidered in a remote point of view; being rarely taken into the courſe of a ſtudent's reading, but referred to as occaſion requires, and are then underſtood by the help of notes and commentaries. It might be expected, that a Hiſtory of the Law ſhould furniſh more notes and more commentaries upon this ſubject, as the only known means of illuſtration: on the contrary, the laws of Henry III. and Edward I. are here very little more than clearly ſtated, in a lan-

guage

guage somewhat more *readable*, if I may use the expression, than that of the Statute-Book.

What was before said upon the general design of the work, will, I hope, satisfy the reader that nothing further was requisite on this subject. As an account of the revolutions in our law antecedent to the making of those statutes, must, all together, contain an account of the law as it stood when they were made, it follows, that the reader enters upon them with a previous information, which will enable him to comprehend their import, on the bare statement of their contents. As to the opinions and principles that were founded on those statutes in after-ages, to take any notice of them would not only exceed the plan of the work, but very often anticipate the materials which are to contribute towards the subsequent parts of the History.

The text of our old statutes was translated in the time of Henry VIII. The ear of a lawyer, by long use and frequent quotation, has been so familiarized to the language of this translation, that it has obtained in some measure the credit of an original. Conformably with the general deference paid to this translation, I have mostly followed the words of it, except where I found it deviated from the text, or the matter required to be treated more closely, or more paraphrastically.

There is one point of juridical history which has been greatly misconceived by many. It has been apprehended, that much light might be thrown

thrown on our ſtatutes by the civil hiſtory of the times in which they were made; but it will be found, on enquiry, that theſe expectations are rarely ſatisfied. The *lay*-hiſtorians, like the body of the people, were as unconcerned in the great revolutions of legal learning in thoſe days, as in ours: and we now ſee a ſtatute for encloſing a common, or erecting a work-houſe, make no ſmall figure in the debates of parliament; while an act for the *amendment of the law*, in the moſt material inſtances, ſlides through in ſilence. Yet the latter would become an important fact to the juridical hiſtorian, while the former was paſſed by unnoticed. I believe little is to be acquired by travelling out of the record; I mean, out of the ſtatutes and year-books, the parliament-rolls, and law-tracts.

The following Hiſtory to the end of Edward I. was publiſhed in one volume in quarto, in March 1783; the remainder, as far as the end of Henry VII. in March 1784. Theſe two volumes have undergone a reviſion, and have received ſome conſiderable additions. I have alſo ſubjoined the reigns of Henry VIII. Edward VI. and queen Mary, or, as it is more properly ſtiled by lawyers, Philip and Mary. This brings us to the cloſe of that period, which appears to be almoſt wholly abandoned to the reſearches of the juridical hiſtorian. We have paſſed the times of the Year-Books, and of their appendages, Fitzherbert and Brooke, the manuals of practicers in former times: we have even touched on thoſe materials,

materials, to which the practicers of the preſent day do not diſdain to owe obligations. *Dyer* and *Plowden* ſtand among the earlieſt of thoſe authorities that are vouched in *Bacon*, in *Viner*, and in *Comyns*, who rarely refer to any antecedent to the reign of Elizabeth.

At this juncture in our legal annals, between the law of former days and that of the preſent, we may be permitted to pauſe for a while. A new order of things ſeems to commence with the reign of Elizabeth, which ſtrikes the imagination as a favourable point of time for reſuming this hiſtorical enquiry afreſh.

In purſuing the changes in our laws thus far, it is hoped, that if nothing is added to the ſtock of profeſſional information, ſomething is done towards giving it ſuch illuſtration and novelty as may aſſiſt the early enquiries of the ſtudent. The inveſtigation here made into the origin of Engliſh tenures, the law of real property, the nature of writs, and the antient and more ſimple practice of real actions, may, perhaps, facilitate the ſtudent's paſſage from *Blackſtone*'s Commentaries to *Coke upon Littleton*, and better qualify him to conſider the many points of ancient law which are diſcuſſed in that learned work.

Jan. 25, 1787. J. R.

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HISTORY

# HISTORY

OF THE

# ENGLISH LAW.

## THE SAXONS.

*The Laws of the Saxons—Thainland and Reveland—Freemen—Slaves—The Tourn—County Court—Other inferior Courts—The Wittenagemote—Nature of Landed Property—Method of Conveyance—Decennaries—Criminal Law—Were—Murder—Larceny—Deadly Feuds—Sanctuary—Ordeal—Trials in Civil Suits—Alfred's Domboc—Compilation made by Edward the Confessor—Saxon Laws.*

CHAP. I. SAXONS.

THE Law of England is constituted of acts of parliament and the custom of the realm; on both which courts of justice exercise their judgment; giving construction and effect to the former; and, by their interpretation, declaring what is and what is not the latter.

WE possess many of these acts of parliament from Magna Charta 9. Hen. III. to the time of Edward III. and from thence in a regular series to the present time. The statutes, except some very few, enacted by the legislature before that period, are lost; though, no doubt, many of the regulations made by them, having blended themselves with the custom of the realm, have been received under that denomination, since the evidence of their parliamentary origin is destroyed. The custom of the realm, or *the common*

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*law*, consists of those rules and maxims concerning the persons and property of men, that have obtained by the tacit assent and usage of the inhabitants of this country; being of the same force with acts of the legislature: the only difference between the two is this; the consent and approbation of the people with respect to the one, is signified by their immemorial use and practice; their approbation of, and consent to the other is declared by parliament, to the acts of which every one is considered as virtually a party.

THE common law, like our language, is of a various and motley origin; as various as the nations that have peopled this country in different parts and at different periods. Some of it is derived from the Britons, and some from the Romans, from the Saxons, the Danes, and the Normans. To recount what innovations were made by the succession of these different nations, or estimate what proportion of the customs of each go to the composing of our body of common law, would be impossible at this distance of time. As to a great part of this period, we have no monuments of antiquity to guide us in our enquiry; and the lights which gleam upon the other part afford but a dim prospect. Our conjectures can only be assisted by the history of the revolutions effected by these several nations.

CERTAIN it is, that the Romans had establishments in this island, more or less, from the time of Claudius; that they did not finally leave it till the year 448, A. D. and that during great part of that period they governed it as a Roman province, in the enjoyment of peace, and the cultivation of arts. The Roman laws were administered as the laws of the country; and, at one time, under the prefecture of that distinguished ornament of them, *Papinian*. When these people were constrained to desert Britain, and attend to their domestic safety, the *Picts* and *Scots* broke in upon the peaceable inhabitants of the southern parts; who, unable to resist the attack, at length applied to the *Saxons* for assistance. Several tribes of Saxons landed here, and first drove the northern invaders within their own borders; then

then turned their arms againſt the Britons themſelves; and having forced great numbers of them into the mountains of Wales, ſubjected the reſt to their dominion, which gradually ſubſided into ſeven independent kingdoms.

THE circumſtances of this revolution are related to be of a kind differing from moſt others. The Saxons are deſcribed as a rude and bloody race; who, beyond any other tribe of northern people, ſet themſelves to exterminate the original inhabitants, and deſtroy ~~every~~ all monuments and remains of their eſtabliſhment. In ſo general a ruin, it cannot be imagined that the cuſtoms of the native Britons, or the laws ingrafted upon them by the Romans, could meet with any favour.

THE kingdoms of the Heptarchy were, for a time, independent of each other; and though a like ſtate of ſociety and manners prevailing in all of them muſt of courſe have produced the like ſpirit and principle of legiſlation in common, yet their laws muſt have been ſpecifically different. Hence grew a variety of laws among the Saxons themſelves. In the reign of Alfred, the Danes, who had long harraſſed the kingdom, were by ſolemn treaty ſettled in Northumberland and the country of the Eaſt Angles, beſides great numbers ſcattered all over the realm. The Danes were after this conſidered, in ſome meaſure, as a part of the nation. They were ſuffered to enjoy their own laws within their diſtrict; and theſe, when their own kings ſat upon the Engliſh throne, pervaded, in ſome degree, all parts of the country.

Laws of the Saxons.

FROM theſe various cauſes it happened, that towards the latter part of the Saxon times, the kingdom was governed by ſeveral different laws and local cuſtoms. The moſt general of all theſe were the three following; the *Mercian Law*, the *Weſt-Saxon Law*, and the *Daniſh Law*. If any of the Britiſh or Roman cuſtoms ſtill ſubſiſted, they were ſunk into, and loſt in one of theſe laws; which governed the whole kingdom, and have ſince received the general appellation of *The Common Law*.

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THE hiſtory of this body of common law, with the divers alterations and improvements which its rules, its principles, and its practice, have received at different times by acts of parliament, and by the deciſions of courts, we ſhall endeavour to inveſtigate and deduce in the following Hiſtory.

THE great obſcurity in which all enquiries concerning theſe times are involved, renders it impoſſible to trace the hiſtory of laws with much certainty. For the preſent we muſt be content, if we can collect what were the outline and ſtriking features of the Saxon juriſprudence in general; without entering into any nice diſcuſſion about the time and manner of the particular changes it might undergo during the long period before the Conqueſt.

IF the law of a country is circumſcribed in its extent by the bounds of a realm, much of its influence and operation depends on the internal diviſions of it; and a hiſtory of the law would be incomplete without noticing the parts of a kingdom; ſo far, at leaſt, as the proceſs of legal proceeding is affected by provincial limits.

THE diviſion of England into counties is very ancient; but is ſaid to have been reduced to its preſent appearance by Alfred. That great Prince carried his ſcheme yet further; and ſubdivided counties into *hundreds*, and hundreds again into *tythings*. This parcelling out of the kingdom into ſmall diſtricts, was made ſubſervient to the well-ordering of the police, and the due adminiſtration of juſtice; as will be ſeen preſently. There was another diviſion purely eccleſiaſtical. *Pariſhes*, and even mother-churches, were known ſo early as the time of king Edgar, about the year 970; for the conſecration of tythes before that time being *arbitrary*, it was ordained by a law of that king[a], that all tythes ſhould be paid *eccleſiæ ad quam* parochia *pertinet*. Beſides theſe diviſions, there was another that had reference to the conditions under which the land of every one

[a] Leg. Eadg. cap. 1.

was

was poſſeſſed; a diviſion which regarded the nature, deſcription, and incidents of landed property. On this, together with that of counties, depended the bounds and extent of judicature.

Thainland and Reveland.

THE lands of the Saxons were divided into *thainland* and *reveland*. Land granted to the *thains*, or lords, was called *thainland*: That over which the king's officer (called in their language *ſhire-reve*, ſince ſheriff) had juriſdiction, was called *reveland*. Again, the former being held by charter, was otherwiſe called *bocland*, or *bookland*: Land of the other kind, being held without writing (probably by thoſe who remained of the firſt inhabitants of the country) was otherwiſe called *folcland*; a diſtinction, which, after the feudal law was eſtabliſhed, received other appellations of a ſimilar import. That within the juriſdiction of the ſheriff, was then called *allodial*: That held of lords, *feudal*. The poſſeſſors of ſuch as has ſince been called allodial, were ſtiled, in the laws of thoſe times, *liberi*; being ſubject to the king alone in his political capacity; in contradiſtinction to tenants under the dominion of the thains, who were called *vaſſals*, being ſubject to the controul alſo of their lord.

Freemen.

THE civil ſtate of the Saxons was of this kind. The whole nation conſiſted of *freemen* and *ſlaves*. The *freemen* were divided into two orders, the *nobles* and the *ceorls*. The nobles were called *thanes*, and were of two kinds; the *king*'s thanes and the *leſſer* thanes. The diſtinction between them ſeems to be, that the former were next in rank to the king, and independent: the latter were dependent on the king's thanes, and ſeem to have occupied lands of their gift, for which they paid rent, ſervices, or attendance in war and peace. Noble deſcent or poſſeſſion of land were the two qualifications that raiſed a man to the rank of thane. The inferior rank of freemen, called *ceorls*, were chiefly employed in huſbandry; ſo much ſo, that a ceorl and a huſbandman became almoſt ſynonimous. Theſe perſons cultivated the farms of the nobility, for which

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which they paid rent; and they seem to have been removable at pleasure [b]. The next order of people, and a very numerous body they were, was that of the *slaves*, or *villains*; a lower kind of *ceorls* [c], who being part of the property of their lords [d], were incapable of any themselves. These are the persons who are described by Sir William Temple, as "a sort of people who were in a condition of "downright servitude, used and employed in the most ser- "vile works; and belonging, they, their children, and "effects, to the lord of the soil, like the rest of the stock "or cattle upon it." However, the power of lords over their slaves was not absolute. If the owner beat out a slave's eye or teeth, the slave recovered his liberty [e]: if he killed him, he paid a fine to the king [f]. These slaves were of two kinds, prædial and domestic.

Slaves.

We shall next take notice of the judicature of the Saxons, which depended, as we before said, on the division of land. In the thainland, the thain himself was the judge: so the judge of the reve-land was the *reve*, or *shire-reve*; whose great court was called the *reve-mote*, or *shire-mote*, and at other times the *folc-mote* [g]. The limits between the official judicature of the king's courts and the court belonging to the lord, were strictly preserved; only when the lord had no court, or refused to do justice; or when the contest was between a vassal of one and a vassal of another; then the suit was referred to the king's court, namely to the reve-mote of the sheriff.

Though the *sheriff*, *earl*, or *ealderman* (by all which names he was known) had properly the government of the county, a bishop was always associated with him in judicial matters. The *bishop* and *sheriff* used twice a year to go a circuit, within a month after Easter, and a month after Michaelmas; and held the great court, called the *tourn*, in

The tourn.

[b] Spelm. Feuds, p. 14.

[c] Persons of this rank were called by the Saxons *Theow*, or *Theowmen*, as appears by LL. Will. Conq. 65, 66. and in LL. Hen. I. 77, 78. servi.

[d] Spelm. Feuds, p. 14.

[e] LL. Alf. sec. 20.

[f] Ibid. 17.

[g] Dalr. Feud. Prop. p. 11.

every

every hundred in the county. This was the grand criminal court, in which all offences both eccleſiaſtical and civil were tried. On the examination of the former, the biſhop ſat as judge, and the ſheriff as coadjutor, to inflict temporal puniſhments: in the latter, the ſheriff was judge, and the biſhop his aſſiſtant, to aid his ſentences, if neceſſary, by eccleſiaſtical cenſures.

County court.

The great court for civil buſineſs was the *county court*, held once every four weeks. Here the ſheriff preſided; but the *ſuitors of the court*, as they were called, that is, the freemen or landholders of the county, were the judges; and the ſheriff was to execute the judgment; aſſiſted, if need were, by the biſhop. Once a-year, at the Eaſter tourn or circuit, the ſheriff and biſhop were to hold alſo a *view of frank-pledge*; that is, to ſee that every perſon above twelve years of age had taken the oaths of allegiance, and found nine *freemen pledges* for his peaceable demeanour.

Other inferior courts.

Out of the tourn were derived two inferior criminal courts, the *hundred* and the *leet*, for the expeditious and eaſy diſtribution of juſtice, where a hundred or manor lay too remote to be conveniently viſited in the courſe of the tourn. The hundred court was held before ſome bailiff; the leet before the lord of the manor's ſteward. Both theſe, though held in the name of a ſubject, were the king's courts. Out of the county court was derived an inferior court of civil juriſdiction, called the *court baron*. This was held from three weeks to three weeks, and was in every reſpect like the county court; only the lord, to whom this franchiſe was granted, or his ſteward, preſided, inſtead of the ſheriff.

The witte-nagemote.

In all theſe courts, juſtice was adminiſtered near the homes of ſuitors with diſpatch, and without much expence. Beſides theſe, there was a ſuperior court, known by the name of the *wittenagemote*, which had a concurrent juriſdiction with them. This court ſat in the king's palace, and uſed to remove with his perſon. The judges, it is ſaid, were the great officers of ſtate, together with ſuch

lords

lords as were about the court. The buſineſs of this court conſiſted in cauſes where the revenue was concerned; where any of the lords were charged with a crime; and in civil cauſes between them. This was the ordinary employment of the court: beſides which, offences of a very heinous and public nature committed even by perſons of inferior rank, were heard here originally; and all cauſes in the inferior courts might be adjourned hither, on account of their difficulty or importance.

Nature of landed property.

THE next object of conſideration is the nature of property among the Saxons: and firſt, of landed property. It has been a queſtion, long debated among the learned, whether the lands of the Saxons were ſubject to the terms of feudal tenure, or whether tenures with all their conſequences were introduced by William the Conqueror. It would hardly afford much inſtruction or amuſement at this time, to enter deeply into an enquiry which has been already ſo unſucceſsfully diſcuſſed, and which has divided ſo many great names. Lord Coke [h], Selden [i], Nathaniel Bacon [k], Sir Roger Owen, [l] and Tyrrell,

[h] 1. Inſt. 776.

[i] Titles of Honour, 510, 511.

[k] Hiſt. Diſc. 161.

[l] When I had entered upon this enquiry into the hiſtory of our law, I looked into the Harleian collection, if any thing could be there found on the ſubject; and there I diſcovered a manuſcript of Sir Roger Owen on "the antiquity and excellency of the common laws of England." I conſidered this as a valuable acquiſition; and particularly ſo, when I ſoon afterwards found ſeveral writers had ſpoken of ſuch a manuſcript, which they had ſeen, and which they regretted had not been made public. I found it mentioned ſomewhere in Tyrrell's *Bibliotheca Politica*; in the collection of teſtimonies prefixed to Wingate's edition of Britton; and, laſtly in Mr. Barrington's Obſervations upon the more Antient Statutes; who ſeems to ſpeak of it as a work that had diſappeared, and which was not known to be now extant. There are two copies of it: one of them is comprized in a folio volume, the other fills three folios; both of them, particularly the laſt, very fair and perfect.

I turned over theſe volumes, in hopes of deriving from thence ſome lights to aſſiſt me in my reſearches; but I was diſappointed. The whole ſeemed to me to be written with a view to maintain the popular argument of thoſe times, that our conſtitution and laws were derived, not from the Normans, but the Saxons; and that the Conqueror made no alteration therein. As this is the great aim of the work, it is confined to the very early period of our law, and conſequently furniſhes very few hints for an hiſtorical deduction that

goes

Tyrrell [m], are of opinion, that tenures were common among the Saxons. Crag [n], lord Hale [o], Somner, [p], ſir Henry Spelman [q], Dr. Brady, and ſir Martin Wright [r], are of opinion, that feuds were firſt brought in and eſtabliſhed by the Conqueror. After this difference of opinion, ſome later writers have taken a middle courſe. Blackſtone [s], Dalrymple [t], and Sullivan [u], endeavour to compromiſe the diſpute, by admitting an imperfect ſyſtem of feuds to have ſubſiſted before the Conqueſt.

PERHAPS the latter of theſe opinions may be neareſt the truth. A ſyſtem of policy that had prevailed over all parts of Europe, it is moſt probable, got footing in England, inhabited by perſons deſcended from the ſame common ſtock, and poſſeſſed of the country they then enjoyed under like circumſtances with the nations on the continent. But the feudal law, in the time of our Saxon kings, was in no part of Europe brought to the perfection at which it afterwards arrived; and in this country, ſeparated from the world, and receiving by ſlow degrees a participation of ſuch improvements as were made in juriſprudence on the continent, we are not to look for a complete ſyſtem of feudal law. At the latter part of this period, feuds on the continent were very little more than in their infant ſtate; they were ſeldom granted longer than for the life of the grantee [x].

WITHOUT engaging in a controverſy whoſe extent and difficulty have eluded the greateſt learning and ſagacity, it will be more ſatisfactory to notice ſuch few facts as we really know reſpecting the landed property of the Saxons. We know that their lands were liable to the *trinoda neceſ-*

goes further down. I believe I have not had occaſion to quote it more than once.

Sir Roger Owen had acquired the reputation of a great antiquarian; he was a particular friend of Whitelock; who quotes him in his Commentary on the Parliamentary Writ, vol. 1. p. 208. See Barr. Obſ. Stat. p. 116.

[m] Introd. vol. 2. p. 84.

[n] Jus Feud. lib. 1. tit. 7.

[o] Hiſt. Com. Law. 107.

[p] Gavel. 100.

[q] Gloſ. Feudum.

[r] Ten. 57.

[s] Vol. ii. p. 48.

[t] Feudal Hiſt. 7.

[u] Lecture 28.

[x] Lib. Feud. 1. tit. 1.

*ſitas*;

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*ſitas*; one of which was a *military ſervice* on foot; another, *arcis conſtructio*; and another, *pontis conſtructio*. They were in general hereditary; and they were partible equally among all the ſons. They were alienable at the pleaſure of the owner; and were deviſeable by will. They did not eſcheat for felony; and the landlord had a right to ſeize the beſt beaſt or armour of his dead tenant as a heriot. This is the principal outline of the terms on which landed property was poſſeſſed among the Saxons.

Method of conveyance.

It ſhould ſeem that a legal transfer might be made of lands by certain ceremonies, without any charter or writing. Ingulphus ſays, *conferebantur prædia nudo verbo, abſque ſcripto vel chartâ, tantùm cum domini gladio, vel galeâ, vel cornû, vel cratere, et plurima tenementa cum ſtrigili, cum arcu, et nonnulla cum ſagittâ*[y]. Thus Edward the Confeſſor granted to the monks of St. Edmund, in Suffolk, the manor of Brok *per cultellum*[z]; and holding by the horn, by the ſword, by the arrow, and the like, were common titles of tenure. However, deeds or charters were in uſe. Theſe were called generally *gewrite*, i. e. writings; and the particular deed by which a free eſtate might be conveyed was uſually called *landboc*, *libellus de terrâ*, a donation or grant of land[a]. The land ſo paſſed was, as has been already obſerved, called *bocland*; and the perſon who ſo conveyed to another was ſaid to *gebocian* him of it. An Anglo-Saxon charter of land has alſo been called *telligraphum*[b]; the etymology of which mongrel term ſeems to imply that the land was therein deſcribed by its ſituation and bounds. But this appellation was probably adopted after the Conqueſt, as a tranſlation of the word *landboc*. The like may be ſaid of the term *cyrographum*, another name by which Anglo-Saxon charters were known: but thoſe denoted by this name were of a peculiar kind; ſuch as had the word *cyrographum* written

[y] Hiſt. Croy. 901. Franc. 1601.
[z] Mad. Form. Diſſ. pa. 1.
[a] Mad. Form. 283.
[b] From *tellus* and γραφω.

in

in capital letters either at the top or bottom of the charter, and cut thro' or divided by a knife[c].

BEFORE the time of Edward the Confeſſor, the uſage was to ratify charters by ſubſigning of names accompanied with holy croſſes. This was done both by the parties and witneſſes. It is generally believed, that Edward the Confeſſor was the firſt who brought into this kingdom the cuſtom of affixing to charters a ſeal of wax. It is ſaid, that being in Normandy, at the court of his couſin William, he there learned ſeveral Norman cuſtoms; and among others which he tranſplanted hither, was this of ſealing deeds with wax. Though the word *ſigillum* often occurs in charters before his time; yet ſome great antiquarians (among whom is ſir Henry Spelman) have agreed, that this did not mean a ſeal of *wax*, but was uſed ſynonimouſly for *ſignum*, and denoted the ſign of the croſs and other ſymbols made uſe of in thoſe times[d].

THERE is no evidence that the Saxons made any diſtinction between real and perſonal property: the whole property of a man was deſcribed by the general term, *res*; and under that denomination was ſubject to the ſame ſucceſſion *ab inteſtato*, and might be given or diſpoſed of by will.

WE are not to imagine that the power of diſpoſing by will was allowed without reſtriction; for we have every reaſon to conclude, from the prevailing cuſtom of the realm in the next period, that they reſtrained a man from totally diſinheriting his children, or leaving his widow without a proviſion. After ſuch duties were reaſonably performed, the remainder of his effects were at his own diſpoſal. Conſiſtently with ſuch ſentiments, we find the law, with regard to the eſtates of inteſtates, delivered in theſe words[e]. *Sive quis incuriâ, ſive morte repentinâ fuerit inteſtatus mortuus, dominus tamen nullam rerum ſuarum*

[c] Mad. Form. Diſſ. 2. [d] Ibid. Diſſ. 27. [e] Leg. Can. c. 68.

*partem*

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*partem (præter eam quæ jure debetur herioti nomine) ſibi aſſumito. Verùm poſſeſſiones uxori, liberis, et cognatione proximis, pro ſuo cuique jure diſtribuantur.*

THERE does not appear ſufficient in the monuments of Saxon antiquity to make us aſſured in what manner they ordered the authentication of wills. It may, however, be conjectured, with ſome probability, that cyrographated or indented copies might be left with the alderman or ſheriff of the county, or with the lord who had a court or franchiſe, where, beſides the hearing of cauſes, other legal proceedings, ſpiritual as well as temporal, were uſually tranſacted. It is more clear, that in this court was made the diſtribution of inteſtates' effects, according to the proportions above laid down. From this may be derived the privilege which the lords of ſome manors claim at this day, to have probate of wills in their manor-court, without the controul or interpoſition of the biſhop.

ALL contracts for the buying or bartering of any thing were required to be made in the preſence of witneſſes. This was as much to prevent the ſale of things ſtolen, or improperly obtained, as to preſerve the memory of contracts and obligations. A law of king Etheldred ordained[f], that if there were no witneſſes to a contract, the thing bargained for ſhould be forfeited to the lord of the ſoil, till enquiry was made about the real ownerſhip.

THIS regulation about contracts is frequently enforced in the Saxon laws; and the beneficial conſequences of ſuch ſtrictneſs muſt have been univerſally felt. It had the effect of precluding queſtions and litigations about matters of contracts, and keeping the law of property in a very plain and intelligible ſtate.

As the forms and circumſtances under which property could become a ſubject of debate in their courts, were few and ſimple; ſo the proceedings muſt in a like degree have been uniform and unembarraſſed. While the objects of

[f] Ca. 4.

legal

legal enquiry admitted of little modification, and contained very little artificial learning, the freemen or landholders of the county were, no doubt, very competent judges of the matters they were to determine, and the parties themselves were equally qualified to be their own advocates. Causes were commenced by lodging a complaint; the admission of which by the officer of the court, and giving a day to the parties, constituted, perhaps, all the practical knowledge of the bar.

BEFORE we speak of the criminal law of the Saxons, let us take a view of that remarkable institution so necessary towards a due execution of it; that is, the police established by Alfred.

Decennaries.

IT is said, that a hundred neighbouring families composed *a hundred*, as the name imports; ten such families constituted a *tything*, *decennary*, or *fribourg*; over which an officer presided, called *the head of the fribourg*[s]. Every man in the kingdom was expected to belong to some decennary; and those who did not, were considered in the light of offenders, or at least of suspected persons, and were accordingly put in prison, till they could get some one to take them in, or become pledge for their good behaviour. In these decennaries, every man was a security for the rest; *pledging* himself that all and every of them should demean himself orderly, and stand to the enquiries and awards of justice. It was from such reciprocal engagement between the *free* members of a decennary, that this sort of community was commonly called *frank-pledge*. If any one fled from justice, the term of thirty-one days was given to the decennary to produce the offender. If he did not then appear, the head of the fribourg was to take two principal persons of his own decennary, and from the three neighbouring decennaries, the head and two of their members: these, together with himself, making twelve, were to purge him and his decennary from any wilfulness or privity to the offender's

[s] Leg. St. Edw. 20.

crime

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crime or flight: and if the head of the fribourg could not purge his decennary in this way, he and his decennary were, of themſelves, to make a compenſation to the party injured.

So great care was taken that perſons ſhould be well known before they were harboured, that if any one took a ſtranger in, and ſuffered him to ſtay three nights under his roof, and the ſtranger afterwards committed any crime; the perſon ſo harbouring was conſidered as having made himſelf a *pledge* for him, as for one of his own family; and was, upon the abſconding of the offender, to make amends to the injured perſon [h].

An eſtabliſhment like this, contributed more effectually than any other to the prevention of crimes, as well as to the detection of offenders.

Criminal law.

We ſhall now take a curſory view of the penal code of this people. The Saxons were particularly curious in fixing pecuniary compenſations for injuries of all kinds, without leaving it to the diſcretion of the judge to proportion the amends to the degree of injury ſuffered. Theſe penalties were more or leſs, according to the time or place in which the wrong was committed, or the part of the body or member which was injured [i]. The cutting off an ear was puniſhed with the penalty of thirty ſhillings; if the hearing was loſt, ſixty ſhillings: ſo, ſtriking out the front tooth was puniſhed with a fine of eight ſhillings; the canine tooth, four ſhillings; the grinders ſixteen ſhillings [k]: if a common perſon was bound with chains, the amends were ten ſhillings; if beaten, twenty ſhillings; if *hung up*, thirty ſhillings [l].

In the ſame manner injuries to property were generally conſidered in a criminal light; and the ſpecific amends to be made by the wrong doer to the injured party, were

[h] Leg. St. Edw. 27.
[i] Leg. Inæ, 6. Leg. Alf. 23.
[k] Leg. Alf. 40.
[l] Leg. Alf. 31.

fixed

fixed by law. A man who mutilated an ox's horn was to pay ten-pence; if that of a cow, then only two-pence: a like distinction was made between cutting off the tail of an ox or a cow[m]. To fight or make a brawl in the court or yard of a common person, was punished with a fine of six shillings; to draw a sword in the same place, even though there was no fighting, with a fine of three shillings: if the party in whose yard this happened was worth six hundred shillings, the amends were treble; and they were increased further, according to the circumstances of the person whose house and domain were so violated[n].

A SYSTEM of regulations framed on this principle seems to have converted all notions of civil redress for injuries into a criminal inquiry; while the degree and circumstances attending the fact, both which it was out of the power of legislation exactly to reach, made no part of the judicial consideration; but the judge was to award the same stated fine, in all cases which could be brought within the letter of the legal description. However, these penalties had so far the nature of a civil redress, that they were given in the way of compensation to the injured person.

THE notion of compensation runs through the whole criminal law of the Anglo-Saxons; who allowed a sum of money as a recompence for every kind of crime, not excepting the taking away the life of a man. Every man's life had its value, called a *were*, or *capitis æstimatio*. This had been various at different periods[o]; in the time, therefore, of king Athelstan, a law was made to settle the *were* of every order of persons in the state. The king, who on this occasion was only distinguished as a superior personage, was rated at 30,000 thrymsæ[p]; an archbishop or earl, at 15,000; a bishop or ealderman, at 8,000; Were.

[m] Leg. Inæ, 59.
[n] Leg. Alf. 35.
[o] Leg. Inæ, 69.
[p] A *thrymsa*, according to Du Fresne, was worth four pence.

*belli*

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*belli imperator*, or *ſummus præfectus*, at 4,000; a prieſt or thane, at 2,000; a common perſon, at 267 thrymſæ. It ſeems this *were* was ſometimes different in different parts of the country[q]. When any perſon was killed, the ſlayer was to make compenſation to the relations of the deceaſed, according to ſuch valuation. In the caſe of the king, half the *were* went to his relations, and half to his people. If the deceaſed was a ſtranger, or had no relations, the *were* was to be divided; half to go to the king, and half to the moſt intimate companion of the deceaſed[r].

As the manners and notions of this people would not allow them to ſubmit to any harſher puniſhment in the firſt inſtance, it was endeavoured to render this as ſevere as poſſible. The *were* was not to be remitted[s]; and to make the offender an example, as well as to prevent the effuſion of blood, all his own relations were, by a law of king Edmund[t], diſcharged from the obligation of abetting him againſt the *feud* of the relations of the deceaſed; whoſe deadly reſentment he was to ſupport *alone*, till he had paid the *were*. A perſon guilty of homicide was alſo excluded from the preſence of the king.

But this *were*, in caſes of homicide, and the fines that were paid in caſes of theft of various kinds, were only to redeem the offender from the proper puniſhment of the law, which was death; and that was redeemable, not only by paying money, but by undergoing ſome perſonal pains: hence it is that we hear of a great variety of corporal puniſhments. A perſon *often* charged with theft, was to loſe his hand or foot[u]. There was alſo the pain of baniſhment and ſlavery[x]; and at one time it was enacted[y], that houſe-breaking, burning of houſes, open robbery, manifeſt homicide, and treaſon againſt one's lord, ſhould

[q] Leg. Athelſt. 3.
[r] Leg. Inæ, 22.
[s] Leg. Edm. 3.
[t] Ca. 3.
[u] Leg. Inæ, 18.
[x] Leg. Can. 6.
[y] Leg. Can. 61.

be

ſhould be *inexpiable* crimes; that is, not to be redeemed by any pecuniary compenſation, or any pain or mutilation.

THUS far of puniſhments. We come now to conſider the notions they had of crimes, and their nature. A perſon preſent at the death of a man was looked on as *particeps criminis*, and as ſuch was liable to a fine [z]. A perſon killing a thief, unleſs he purged himſelf by oath before the relations of the deceaſed, relating all the circumſtances of the fact, and that immediately, was to pay a fine [a]. If one in hewing a tree, happened to kill a man, the relations were entitled to the tree, provided they took it within thirty days [b]; which was in the nature, and might perhaps be the origin, of *deodands*. It does not appear that they made any diſtinction in the degrees of homicide; except in one inſtance, which deſerves particular notice; and that is, where the fine called *murdrum* was to be paid. It is ſaid that Canute, being about to leave the kingdom, and afraid that the Engliſh might take advantage of his abſence to oppreſs or deſtroy his own ſubjects, the Danes, procured the following law in order to prevent ſecret homicides: That when any perſon was killed, and the ſlayer had eſcaped, the perſon killed ſhould be always conſidered as a Dane, unleſs proved to be Engliſh by his friends or relations; and in default of ſuch proof, that the vill ſhould pay forty marks for the Dane's death; and, if it could not be raiſed in the vill, that the hundred ſhould pay it. This ſingular proviſion, it was thought, would engage every one in the prevention or proſecution of ſuch ſecret offences [c]. It was upon this ſort of policy that preſentments of *Engliſhery*, as they were afterwards called, were founded.

Murder.

LARCENY, called by the Saxons *ſtale*, might have been committed by a child of ten years old [d]; but afterwards this crime was not imputed, unleſs the child was twelve years

Larceny.

[z] Leg. Inæ, 33. Leg. Alf. 26.
[a] Leg. Inæ, 34.
[b] Leg. Alf. 13.
[c] Leg. Confeſſ. 15, 16.
[d] Leg. Inæ, 7.

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of age[e]. If all the family of the offender were privy to the ſtealing, they were all to be made ſlaves[f]. Where there was not that privity in a family, the mulct was, at one time, ſixty ſhillings; at another time, one hundred and twenty ſhillings[g]. Such regard was paid to the character of a wife, and the ſubjection ſhe was ſuppoſed to be under to her huſband, that when any thing ſtolen was found in their houſe, the law conſidered her as no party in the ſtealing, unleſs it were manifeſtly in her ſeparate cuſtody[h].

THE more atrocious of theſe offenders, when they came in a body of ſeven, were called *theof*, or *prædones*; if more than ſeven, they conſtituted *turma*; if more than thirty-five, they were then called *exercitus*[i]. Theſe diſtinctions ſhew in what manner theſe people carried on their depredations, in the times before Alfred reformed the police.

FALSE ſwearing was, at firſt, only puniſhable by a fine of one hundred and twenty ſhillings[k]. Afterwards[l], falſe ſwearers were conſidered as no longer intitled to credit, and were obliged to purge themſelves, not by their own affirmation on oath, but by the ordeal: they were ſometimes excommunicated.

BREACHES of the peace were ſeverely puniſhed, as leading uſually to bloodſhed and death. If a perſon fought in the king's palace, his life was in the king's hands, unleſs he redeemed it with a fine[m]; and particular penalties were inflicted on thoſe who fought in the preſence of the biſhop and ealderman[n]; or in the city or town where the biſhop and ealderman were then holding their court[o]. A law of king Edmund's was ſo ſevere[p], that if any one attacked another in his houſe, or broke the peace there, he was to forfeit every thing, and his life was to be at the king's diſpoſal. The great occaſion of violent breaches of the peace,

[e] Leg. Athelſt. 1.
[f] Leg. Inæ, 7.
[g] Leg. Athelſt. 1.
[h] Leg. Inæ, 58. Leg. Can. 74.
[i] Leg. Inæ, 13, 14, 15.
[k] Leg. Inæ, 12.
[l] Leg. Edw. 3.
[m] Leg. Alf. 7.
[n] Ibid. 15. 34.
[o] Ibid. 36.
[p] Leg. Edm.

were

were the *deadly feuds* by which people in thoſe times revenged the death of a relation. This method of proſecuting offenders had become ſo habitual to the people, that it appeared neceſſary even to make it a part of the penal code; and it was accordingly inſerted under reaſonable reſtrictions in a law of Alfred[q]. At length it was thought expedient to impoſe additional checks on this ſingular piece of criminal juriſprudence. This was done by a law of Edmund[r]; which directs, that ſomebody, in the nature of an arbiter, ſhould be deputed to the relations of the deceaſed, and engage that the ſlayer ſhould make compenſation. He, in the mean time, was to be put into the hands of this arbiter, who was to ſee that ſufficient ſureties were taken for paying the *were* in twenty-one days; during which time there was to be peace, by mutual compact.

Deadly feuds.

VERY early after the Saxons had been converted to Chriſtianity, places of public worſhip were held in ſuch reverence, that a criminal flying thither was, during his ſtay there, allowed protection, whatever his crime might be[s]. It was uſual to fly to ſuch a place of ſecurity, to avoid the inſtant reſentment of the aggrieved party, till proviſion could be made for paying the legal compenſation. In a ſtate of ſociety like that among the Anglo-Saxons, the immunity indulged to places of worſhip was politic, humane, and neceſſary. It prevented the ſhedding of blood, and preſerved the peace. Accordingly a penalty was inflicted on thoſe who dared to violate this place of ſanctuary, by evil-treating the culprit while there[t]; the *pax eccleſiæ* being more ſacred, and in this inſtance better protected by law, than the *pax regis*. The offender might ſtay there thirty days, and was then to be delivered to his relations unhurt and ſafe[u]. Notwithſtanding this regard for churches, there ſeems to have been no immunity granted to the perſons of church-

Sanctuary.

[q] Leg. Alf. 38.
[r] Leg. Edm. 7.
[s] Leg. Ine, 5.
[t] Leg. Alf. 2.
[u] Ibid. 5.

men. If a clerk committed homicide, he was to be degraded from his orders, and was, moreover, to make his compenſation, or ſuffer puniſhment, in the ſame manner as any other perſon[x].

THE bringing of criminals to juſtice was very much facilitated by the police eſtabliſhed in the reign of Alfred. The objects which next preſent themſelves, are the proceeding, the mode of trial, and the proof; all which were very remarkable parts of the Anglo-Saxon juriſprudence. The proſecutor, or accuſor, as he was called, made his charge; which, it ſhould ſeem, was ſufficient alone to put the perſon accuſed on his defence. The defence and anſwer to this charge was this: If it was a matter not of great notoriety, but ſuch as might admit of ſome doubt, the party *purged* himſelf by his oath, and the oaths of certain perſons (called thence *compurgators*) vouching for his credit, and declaring the belief they had that he ſpoke truth. If the compurgators agreed in a favourable declaration, this was held a complete acquittal from the accuſation. But if the party had been before accuſed of larceny or perjury; or had any otherwiſe been rendered infamous, and was thought not worthy of credit, he was driven to make out his innocence by an appeal to heaven, in the trial by *ordeal*. This was of ſeveral kinds. The two principal were by water and iron; by water hot or cold, and by hot iron: the iron was to be of one, two, or three pounds weight; and was, therefore, called ſimple, double, or triple ordeal.

THE *ordeal* was conſidered as a religious ceremony. The perſon, the water, and the iron were accordingly prepared under the direction of the prieſt, by exorciſms and other formalities, and the whole conducted with great ſolemnity. For three days before the trial, the culprit was[y] to attend the prieſt, to be conſtant at maſs, to make his offering, and in the mean time to ſuſtain himſelf on nothing but bread,

[x] Leg. Can. 36. 38.

[y] Leg. Athelſt. 23.

ſalt,

ſalt, water, and onions. On the day of trial, he was to take the ſacrament, and ſwear that he was not guilty of, or privy to, the crime imputed to him. The accuſor and accuſed were to come to the place of trial, attended with not more than twelve perſons each, probably to prevent any violence or interpoſition; and a production of more than that number by the accuſed would have amounted to a conviction. The accuſor was then to renew his charge upon oath, and the accuſed to proceed in making his purgation. If it was by hot water, he was to put his hand into it, or his whole arm, according to the degree of the offence: if it was by cold water, his thumbs were tied to his toes, and in this poſture he was thrown into it If he eſcaped unhurt by the boiling water, which might eaſily be contrived by the art of the prieſts, or if he ſunk in the cold water, which would certainly happen, he was declared innocent. If he was hurt by the boiling water, or ſwum in the cold, he was conſidered as guilty[z].

If the trial was to be by the hot iron, his hand was firſt ſprinkled with holy water; then taking the iron in his hand, he walked nine feet. The method of taking his ſteps was particularly and curiouſly appointed. At the end of the ſtated diſtance he threw down the iron, and haſtened to the altar; then his hand was bound up for three days, at the end of which time it was to be opened; and from the appearance of any hurt, or not, he was declared in the former caſe, guilty, and in the latter, acquitted. Another method of applying this trial by hot iron, was by placing red-hot plough-ſhares at certain diſtances, and requiring the delinquent to walk over them; which if he performed unhurt, was conſidered as a proof of his innocence. Theſe trials by water and fire were called *judicia Dei*.

Another method of trial was by the *offa execrata*, or Corſned; which was that by which the clergy were uſed to

[z] Leg. Athelſt. 23.

purge

purge themſelves, and which they choſe, probably, as the leaſt likely to put the party to any peril. A morſel of bread was placed on the altar with great ceremony and preparation, which the perſon to be tried was to eat: if it ſtuck in his throat, this was to be conſidered as a token of his guilt. Thus, in this inſtance and that of the cold water, a miracle was ſuppoſed to be wrought, to prove the guilt of the perſon; in thoſe of the hot water and hot iron, the like divine interpoſition was expected to demonſtrate his innocence. Another ordeal was, that of *the croſs*. This was performed by placing two ſticks, one with a croſs carved upon it, and one without; and making the culprit chuſe one of them blindfolded. If he hit upon that which had the croſs upon it, this piece of good fortune was looked upon as an evidence of his innocence. Theſe ſeem to have been the methods of inveſtigating truth in criminal enquiries.

It may be obſerved, that the Anglo-Saxons made a diſtinction between manifeſt or open offences, and ſuch as were not ſo public; and the degree of puniſhment was proportioned accordingly. It has been obſerved, that this implied ſome doubt entertained by themſelves of their methods of proof [a]; but it may be remembered, that the Romans made the like diſtinction, and inflicted only half the puniſhment on *furtum non manifeſtum*, which they did on that which was *manifeſtum*.

Trial in civil ſuits.

Next as to civil cauſes, and the manner in which they were tried. It ſeems, that cauſes in the county and other courts were heard and determined by an indefinite number of perſons called *ſectatores*, or ſuitors of court; and there is no great reaſon to believe that they had any juries of twelve men, which was an invention of a much later date. Theſe *ſectatores* uſed to give their judgment or verdict both upon the matter of fact and of law. It may be a doubt, whether they ever acted as an inqueſt to make enquiry of crimes and delinquents, as juries did after the Conqueſt.

[a] Littl. Hen. II. vol. 5. 292.

In

In a law of king Ethelred [b], there is a proviſion that there ſhould be twelve *thanes*, or *liberi homines* of ſuperior conſideration and parts, whoſe concurrence was made neceſſary. It ſhould ſeem, however, theſe were rather aſſeſſors to the judge of the court, than a part of the ſuitors, or indeed any thing like a jury [c]. By all the monuments that remain of theſe times, it appears, that the number of *ſectatores* was various, according to the cuſtom of different places; and perhaps in moſt inſtances depended on chance and convenience; but in no caſe is there the leaſt reaſon to believe that it was confined to twelve [d]. Theſe *ſectatores* diſcharged their office, it is thought, without any other obligation for a true performance of it, than their honour; for it does not appear that they were *ſworn* to make a declaration of the truth [e]. It is not improbable, that the *thanes* in the counties, the citizens in boroughs, and thoſe who were the *ſectatores* in other courts, might determine all cauſes, in like manner as peers of the realm, at this day, determine in criminal caſes, without an oath. There is at leaſt a perfect ſilence as to this ſubject in the remains of antiquity; and the moſt we can conjecture is, that they might perhaps ſolemnly engage to ſpeak the truth in all matters which ſhould come before them, without renewing it in every particular cauſe [f].

It is not unſuitable with what has been already ſaid of the modes of proof uſed by theſe people, to ſuppoſe that they admitted the oath of the defendant in civil cauſes, when that oath was ſupported by *compurgators*, who ſwore they believed what he ſaid to be true. The laws requiring witneſſes to all contracts, ſupplied evidence almoſt in all enquiries about them; but where that was not the caſe, it ſeemed conſiſtent enough with the eſtabliſhed order of living in thoſe times to allow credit to a man's oath, *when*

[b] Leg. Ethel. ca. 4.
[c] Hickes' Theſ. Diſſ. Pp. 34.
[d] Ibid. 33.
[e] Ibid. 42.
[f] Ibid. 42.

ſupported

ſupported by the concurring teſtimony of others to his credit. The ſmall diſtricts into which the people were divided, and the conſequent relation which by law they bore to each other, furniſhed abundant opportunities for a man's character to be known; and declarations of his neighbours concerning his credibility might be received with no ſmall degree of confidence.

It cannot be diſſembled that ſome learned men have been of opinion, that the trial by jury was in uſe among the Saxons; and this point, like ſome others, has been maintained with great pertinaciouſneſs by thoſe who have laboured to prove the antiquity of our juridical conſtitution.

This opinion may, probably, have been founded on the ſimilitude between *ſectatores* and *jurors*; an appearance which, on a ſuperficial view, may indeed deceive. However, it may be laid down with ſafety, that the trial by jury did not at this time exiſt; and if the reader will ſuſpend his judgment till he comes to thoſe times when the trial by jury was really eſtabliſhed, he will then ſee diſtinctly the eſſential difference between *ſectatores*, *compurgatores*, and *juratores*; and will agree with us in declaring, that the frequent mention of *ſectatores* is no proof of *juries*, properly ſo called, being known to our Saxon anceſtors.

Thus have we attempted to give a ſketch of that ſyſtem of juriſprudence which ſubſiſted among the Saxons. The materials which furniſh any knowledge of it are ſo few and ſcanty, that it is with the utmoſt difficulty any thing conſiſtent can be collected from them. This muſt give riſe to a variety of opinions, according as perſons are biaſſed by prejudices and different turns of thinking. Perhaps, after all, the cleareſt opinion that can be formed reſpecting ſuch diſtant and obſcure times, is not worth defending with much obſtinacy.

Of this the reader will be able to judge, when, in the courſe of this Hiſtory, he finds inſtitutions either ſo abundantly ſuperinduced upon the original ground-work, or ſo entirely

entirely ſubſtituted in the place of it, that very little remains of the Saxon juriſprudence can be traced, even in the earlieſt times of our known law, after the Conqueſt. The parts which alone ſurvived that revolution, ſeem to have been the methods of trial, ſome notions of criminal law, and the ſcheme of police. The others were gradually ſuperſeded, and at length are no longer known.

It remains now to enquire what ſteps were taken by the Anglo-Saxons in collecting and improving their laws, and what monuments they left of their legal polity.

We are told, that the great and good king Alfred, beſides the regulations he made for the better order and government of his people, ſeeing how various the local cuſtoms of the kingdom were, made a collection of them; and out of them compoſed his *Dom Boc*, or *Liber Judicialis*. It ſeems this was intended as a code for the government of his whole kingdom; and it obtained, with great authority, during ſeveral reigns; being referred to, in a law made by king Athelſtan, as an *authoritative* guide[g].

Alfred's Dom Boc.

However, this work, valuable as it was, had probably the defects of all original attempts. On that account, as well as on account of the irruption and ſettlement of the Danes, and the conſequent prevalence of their cuſtoms, it was found neceſſary in the days of king Edgar to reviſe this compilation, or make another more full and more ſuitable to the then ſtate of the law. But this undertaking was left unfiniſhed; ſo that the grand deſign of making a complete code of Engliſh law fell to the part of Edward the Confeſſor; who is ſaid[h] to have collected from the Mercian, Weſt Saxon, and Daniſh law, an uniform body of law to be obſerved throughout the kingdom[i]. From this circumſtance, the character of an eminent legiſlator has been conferred on Edward the Confeſſor by poſterity; who have endowed him

Compilation by Edward the Confeſſor.

[g] Ca. 5.
[h] Hoveden, Hen. II. Leg. St. Edw.
[i] 1. Ela. 66. 35 to 36. Lamb. p. 149.

with

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with a ſort of praiſe nearly allied to that of Alfred: for as one is dignified with the title of *legum Anglicanarum Conditor*, the other has been called *legum Anglicanarum Reſtitutor*.

It is ſaid, that the *Dom Boc* of Alfred was in being about the time of Edward IV.; but we hear nothing of the fate attending the volume compiled by Edward the Confeſſor. As to the nature of the work; it ſeems probable, that as the Danes had now become incorporated into the body of the people, their laws were melted down into one maſs with the Mercian and Weſt Saxon; and all together compoſed a ſet of laws to govern both people. This, moſt likely, was done with equable qualifications of all theſe laws, ſo as to render ſubmiſſion to them, by both nations, neither ſtrange nor oppreſſive. It ſhould ſeem, there was throughout that book a conſtant intimation what was Saxon, Mercian, or Daniſh; as we find in the laws of William the Conqueror, which were deſigned to make certain alterations in thoſe of Edward, frequent mention of them by their reſpective names, as different ſubſiſting laws.

As the collection of Edward the Confeſſor comprized in it the whole law of the kingdom, it contained not only the unwritten cuſtoms, but the laws and ſtatutes made by the ſeveral kings. By the loſs of this volume, we are left very much in ignorance as to the extent, ſcope, and nature of theſe cuſtoms. It is not ſo with the written laws of theſe times; for we have many of theſe ſtill remaining. Theſe remains of Saxon legiſlation give us ſome inſight into the nature of their juriſprudence.

As laws, if not made to create ſome new regulation, are deſigned to reſtrict, amend, or enlarge ſome pre-exiſtent cuſtom, or law; they always enable us to make ſome conjectures reſpecting the ſubject upon which they are intended to operate. From theſe Saxon laws we may pronounce, that matters of judicial enquiry were treated with great plainneſs and ſimplicity. Like the laws of a rude people, they are princi-

principally employed about the ordering of the police; and accordingly contain an enumeration of crimes and their punishments. As this makes the greater part of the Saxon laws now existing, it may fairly be concluded that the *Dom Boc* of Alfred and the compilation of Edward the Confessor were mostly filled with the same kind of matter.

Saxon Laws.

THE first of the Saxon laws, now in being, are those of king Ethelbert. These are the most antient laws in our realm, and are said to be the most antient in modern Europe. This king reigned from 561 to 636. The next are the laws of Hlothaire and Eadric, and of Wihtred, all kings of Kent. Next are those of Ina, king of the West Saxons. After the Heptarchy we have the laws of Alfred, Edward the Elder, Athelstan, Edmund, Edgar, Ethelred, and Canute. Besides these, there are canons and constitutions, decrees of councils, and other acts of a public nature. These are in the Saxon language, and were some of them collected in one volume in folio, by Mr. Lambard, in the time of queen Elizabeth, and published under the title of Αρχαιονομια; *sive, de priscis Anglorum legibus*. To this additions have since been made by Dr. Wilkins. These remains compose, all together, a body of Anglo-Saxon laws for civil and ecclesiastical government.

WE have refrained from mentioning some laws which have gone under the name of Edward the Confessor, as they have been rejected for spurious*, upon the fullest consideration of antiquarians. They are in Latin, and bear evident internal marks of a later period. They are supposed to have been written, or collected, about the end of the reign of William Rufus; and are to be found in the collections of Lambard and Wilkins.

* Spelman voce Ballivus.

CHAP.

## CHAP. II.

## WILLIAM the CONQUEROR to JOHN.

*The Conqueſt—Saxon Laws confirmed—The Laws of William the Conqueror—Trial by Duel in Criminal Queſtions—Eſtabliſhment of Tenures—Nature of Tenures—Different Kinds of Tenures—Villenage—Of Eſcuage—Conſequences of Tenure—Of Primogeniture—Of Alienation—Of Judicature—The Curia Regis—Juſtices Itinerant—The Bench—The Chancery—Judicature of the Council—Of the Spiritual Court—Of the Civil and Canon Law—Doctrines of the Canon Law—Probate of Wills—Conſtitutions of Clarendon—Of Trial by Duel in Civil Queſtions—Of Trial by Jury—by the Aſſize—Of Deeds—A Feoffment—A Fine—Of Writs—Of Records.*

CHAP. II. WILLIAM the CONQUEROR to JOHN.

THE acceſſion of William of Normandy to the Engliſh throne makes a memorable epoch in the hiſtory of our municipal law. Some Saxon cuſtoms may be traced by the obſerving antiquary, even in our preſent body of law; but in the eſtabliſhment made in this country by the Normans, are to be ſeen, as in their infancy, the very form and features of the Engliſh law. It is to the conqueſt and to the conſequences of that revolution that the juridical hiſtorian is to direct his particular attention. A new order of things then commenced. The nature of landed property was entirely changed; the rules by which perſonal property was directed, were modified; a new ſyſtem of judicature was erected; new modes of redreſs conceived; new forms of proceeding were deviſed; the rank and condition of individuals became entirely new; the whole conſtitution was altered; and, after fluctuating on a ſingular policy, pregnant with the moſt oppoſite conſequences of freedom and ſlavery, by degrees ſettled into peace and orderly government. In ſhort,

ſhort, a ſtate of things then took place, from which, after innumerable alterations, aroſe the preſent frame of Engliſh juriſprudence.

IT has long been a debated queſtion, in what manner William was the *conqueror* of this iſland; nor has the diſcuſſion been confined to hiſtorians and antiquaries: the adherents of modern parties did, at one time, warmly intereſt themſelves in the deciſion of a point, which they conſidered as involving conſequences very material to the political opinions they avowed. The lovers of high monarchical authority thought they derived a very ancient and rightful title to all kinds of prerogative in the king, by maintaining that William made the people of this country ſubmit, as a conquered nation, to his abſolute will. The friends of liberty, admitting, as it ſhould ſeem, in ſome meaſure, the conſequences of ſuch a claim, contended as firmly that William never aſſumed ſuch powers, and was in truth no conqueror. Attempts have been made to explain the term *conqueſt* in ſuch a manner as to get rid of any unfavourable concluſions from the word. It is ſaid to have been a conqueſt over Harold, and not over the kingdom; that conqueſt ſignifies *acqueſt*, or new-acquired feudal rights*; with other explications of the like deſign and import; ſo important a matter was it eſteemed to aſcertain the true nature of this event in our hiſtory; as if the tyranny of a prince who lived ſeven hundred years ago, could be a precedent for the oppreſſions of his ſucceſſors; or any length of time could eſtabliſh a preſcription againſt the unalienable rights of mankind. The preſent prevailing notions of free government are founded on better grounds than the examples of former ages, when our conſtitution was agitated by many irregular and violent movements: they are founded on a rational conſideration of the ends of all government, the good of

The Conqueſt.

* In the law of Scotland, at this day, *feuda nova*, or, as we call it, lands taken by purchaſe, are termed *feus of* CONQUEST Erſk. Prin. b. 3. tit. 8. ſect. 6.

the

the whole community. To leave ſuch uſeleſs diſquiſitions, let it ſuffice to relate the fact; that William put off the character of an invader as ſoon as he conveniently could; and took all meaſures to quiet the kingdom in the enjoyment of its own laws, and a due adminiſtration of juſtice.

Saxon laws confirmed.

We are told, that in the fourth year of his reign, at Berkhamſtead, in the preſence of Lanfranc archbiſhop of Canterbury, he ſolemnly ſwore that he would obſerve the good and approved antient laws of the kingdom, particularly thoſe of Edward the Confeſſor; and he ordered, that twelve Saxons in each county ſhould make enquiry, and certify what thoſe laws were.

When the reſult of this enquiry was laid before William, and he had ſet himſelf to conſider the different laws of the kingdom more particularly; he ſhewed a diſpoſition to give a preference to the Daniſh, as more conformable with thoſe of Normandy; being ſprung from the ſame root, and better ſuited to the genius of his own ſubjects. This alarmed the Engliſh, who wiſhed to have no more of that law impoſed, than what had been incorporated into their cuſtoms by Edward the Confeſſor. They beſeeched him not to recede from his ſolemn engagement; and conjured him by the ſoul of Edward, who had bequeathed him his preſent ſovereignty, to confirm the Engliſh in poſſeſſion of their laws as they ſtood at the death of the Confeſſor. To this William at length conſented, and, in a general council [1], ſolemnly ordained, that the laws of Edward, with ſuch alterations and additions as he himſelf had made to them, ſhould in all things be obſerved.

In this manner was the ſyſtem of Saxon juriſprudence confirmed as the law of the country; and from thenceforth it continued the baſis of the common law, upon which every ſubſequent alteration was to operate.

[1] Leg. Conq. 63.

Though

THOUGH theſe alterations ſoon grew very conſiderable, yet the direct and open change by poſitive laws was not great. The laws of William are in *pari materiâ* with thoſe that remain of the Saxon kings; except ſuch as introduced the feudal conſtitution, and the trial by duel. But a revolution was effected through other means, and that by ſlow and imperceptible degrees. The Normans brought over with them a diſpoſition to favour the inſtitutions to which they had been uſed in their own country; and the comparative ſtate of the two people enabled them to ſucceed in the attempt. Having, from their continental ſituation, had greater opportunities of improving their polity and manners, they had very far ſurpaſſed the Saxons in knowledge and refinement. This was diſcoverable in their laws; which were conceived and explained with ſome degree of artificial reaſoning. Though this juriſprudence was ſimple, compared with what it grew to in after-times, it was conceived on principles ſuſceptible of the inferences and conſequences afterwards really deduced from it.

THE doctrine of tenures being once eſtabliſhed by an expreſs law, all the foreign learning concerning them of courſe followed. The other parts alſo of the Norman juriſprudence, their rules of property and methods of proceeding, ſoon began to prevail: they were referred to and debated upon as the native cuſtom of this realm, or very fit to be ingrafted into it; and being once introduced and diſcuſſed in the king's courts, which were framed upon the Norman plan, and preſided over by Norman lawyers, they gradually became a part of the common law of England.

THE revolution effected by theſe means was very important indeed. Beſides tenures, with all their incidents and properties, the *aula*, or *curia regis* was eſtabliſhed; as was the law of eſtates, the uſe of ſealed charters, the trial by a jury of twelve men, and the ſeparate juriſdiction of the eccleſiaſtical judge. Theſe were almoſt inſtant conſequences

sequences of the Conqueſt. The other branches of the Norman law ſoon followed upon the like tacit admiſſion, that they conſtituted a part of the common law of the realm.

The laws of William the Conqueror.

We ſhall now conſider thoſe laws which were made by William the Conqueror, and have conſtantly gone under his name. The regulations made by theſe laws ſeem, moſt of them, very little worthy of curioſity, as differing in nothing from the ſubject of many Saxon conſtitutions. They make ſome alterations in the value of *weregilds* and penalties. They ſometimes merely enforce or re-enact what was before the law of the realm; taking notice of the differences obſerved by the three great governing polities, the Weſt-Saxon, Daniſh, and Mercian. The parts of theſe laws which are moſt material are the following.

The *relief*, or conſideration to be paid to the ſuperior upon ſucceeding to the inheritance, was ſettled in the caſe of an earl, baron, and vavaſor; the firſt at eight horſes, the ſecond at four, and the laſt at one; theſe were to be capariſoned with coats of mail, helmets, ſhields, and other warlike accoutrements[m]. The relief of thoſe who held by a certain rent, was to be one year's rent[n]; and that of a ſlave, or, as he was now called, a *villain*, was to be his beſt beaſt[o]. It was directed, that if a man died inteſtate, his children ſhould divide the inheritance equally[p]. It was ſtrictly enjoined, that no one omit paying the due ſervices to his lord, on pretence of any former indulgence[q]. A regulation was made reſpecting *namium*, or, as it has ſince been called, a *diſtreſs*; a kind of remedy which, according to ſome, was introduced by the Normans, and according to others was before in uſe here. It was directed[r], that a *namium* ſhould not be taken till right had been demanded three times in

[m] 29 Conq. 22, 23, 24.
[n] 40.
[o] 29.
[p] 38.
[q] 34.
[r] 42.

the

the county or hundred court; and if the party did not appear on the fourth day appointed, that the complainant ſhould have leave of court to take a *namium* or diſtreſs ſufficient to make him full amends. Thus this ſummary remedy was conſidered only in the light of a compulſory proceſs, and was therefore called *diſtrictio* (and thence in aftertimes *diſtreſs*) from *diſtringere*, which, in the barbarous latinity of thoſe days, ſignified *to compel*. The remarkable law made by Canute in protection of his Danes was adopted by William, in favour of his own ſubjects. He ordained [s] that where a Frenchman [t] was killed, and the people of the hundred had not apprehended the ſlayer and brought him to juſtice within eight days, they ſhould pay forty-ſeven marks, which fine was called *murdrum*. By virtue of this, preſentments of *Engliſhery* were made; and all the former law upon the ſubject was continued, with the ſingle difference of putting *Frenchman* in the place of *Dane*. William forbad all puniſhments by hanging, or any other kind of death [u]; and ſubſtituted in the place of it ſeveral kinds of mutilation; as the putting out of eyes, cutting off the hands or feet, and caſtration. This alteration was made, ſays the law, that the trunk may remain a living mark of the offender's wickedneſs and treachery.

THERE are ſome laws of William which eſtabliſh the trial by *duel*, and ſketch out certain rules for the application of it [x]. By one law, the ſame liberty is given to an Engliſhman, which every Frenchman had in his own country, to accuſe or appeal a Frenchman, by duel, of theft, homicide, or any other crime, which before that time uſed to be tried either by the ordeal or duel. If an Engliſhman declined the duel, then the Frenchman was at liberty to purge himſelf by the oaths of witneſſes, according to the law of Normandy. On the other hand, if a Frenchman [y]

[s] 26.
[t] Francigena.
[u] 229. Conq. 67.
[x] 68.
[y] 69.

appealed an Engliſhman by duel, the Engliſhman was to be allowed his election, either to defend himſelf by duel or by ordeal, or even by witneſſes; and if either of them were infirm, and could not or would not maintain the combat himſelf, he might appoint a champion. If a Frenchman[z] was vanquiſhed, he was to pay to the king ſixty ſhillings. In caſes of outlawry[a], the king ordained, that an Engliſhman ſhould purge himſelf by *ordeal*; but that a Frenchman appealed by an Engliſhman in ſuch a caſe, ſhould make out his innocence by duel. However, if the Engliſhman ſhould *be afraid*[b], ſays the law, to ſtand the trial by duel, the Frenchman ſhall purge himſelf *pleno juramento*, that is, by oaths of compurgators.

THUS was the trial by duel formally eſtabliſhed in criminal enquiries; but with ſuch qualifications annexed, as ſhew a regard to the prejudices which both people had in favour of their own cuſtoms. The trial by duel in civil cauſes does not appear to have been introduced by any particular law; but, when this opening was made, it ſoon began generally to prevail; and indeed, after ſuch a precedent, it had more colour of legal authority than the numerous other innovations derived from that nation.

Eſtabliſhment of tenures.

IT was declared by a law of William[c], that all freemen ſhould enjoy their lands and poſſeſſions free from *unjuſt exactions and talliages*; ſo that nothing be taken from them but what was due by reaſon of ſervices, to which they were bound. What thoſe ſervices were, we are now going to conſider.

THE moſt remarkable of William's laws are cap. 52. and 58. The tenor of the 52d is this: *Statuimus, ut omnes liberi homines fœdere et ſacramento affirment, quòd intra et extrà univerſum regnum Angliæ (quod olim vocabatur regnum Brittaniæ), Wilhelmo ſuo domino fideles eſſe velint; terras et honores illius fidelitate ubique ſervare cum eo, et contra inimicos*

[z] 70. In theſe and the other paſſages the word is *Francigena*.

[a] *De omnibus rebus utlagariæ*, 71.

[b] *Non audeat*.

[c] 55.

et

*et alienigenas defendere.* The interpretation put upon this law is, that all owners of land are thereby required to engage and ſwear, that they become vaſſals or tenants, and as ſuch will be faithful to William, as lord, in reſpect of the *dominium* (upon the feudal notion) reſiding in a feudal lord [d]; that they would ſwear, every where faithfully to maintain and defend their lord's territories and title as well as his perſon; and give him all poſſible aſſiſtance againſt his enemies, whether foreign or domeſtic [e]. Theſe engagements and obligations being the fundamental principles of the feudal ſtate, it was ſaid, that when ſuch were required from every freeman to the king, that polity was in effect eſtabliſhed.

As the enacting language of this law is in the firſt perſon plural, *ſtatuimus*, and the king is ſpoken of in the third perſon, ſome writers think it muſt be conſidered as an act of the legiſlature. A regulation that was at once to overturn the whole law of the kingdom with regard to land, could not well be hazarded on any other authority; and indeed chap. 58. of theſe laws, which dilates more largely upon the ſubject of this, refers to it as ordained *per commune concilium.*

THE terms of this law are very general; and probably it was purpoſely ſo conceived, in order to conceal the conſequences that were intended to be founded thereon. The people of the country received with content a law which they looked upon in no other light than as compelling them to ſwear allegiance to William. The nation in general, by complying with it, probably meant no more than the terms apparently imported, namely, that they obliged themſelves to ſubmit, and be faithful to William, as their lord, or king, to maintain his title and defend his territory [f]. But the perſons who penned that law, and William who promoted it, had deeper views, which were a little more explained in his 58th law. This conſtitution runs in theſe words: *Statui-*

[d] Wright Ten. 68. [e] Ibid 68. [f] Ibid. 79.

*mus etiam, et firmiter præcipimus, ut omnes comites et barones, et milites, et ſervientes, et univerſi liberi homines totius regni noſtri predicti habeant et teneant ſe ſemper bene in armis et in equis, ut decet, et oportet; et quòd ſint ſemper prompti, et bene parati ad ſervitium ſuum integrum nobis explendum, et peragendum, cùm ſemper opus fuerit, ſecundum quod nobis* DE FEODIS *debent et tenementis ſuis de jure facere, et ſicut illis ſtatuimus per commune concilium totius regni noſtri prædicti, et illis dedimus et conceſſimus in fœdo, jure hæreditario.*

By this law the nature of the ſervice to be performed is expreſsly mentioned, namely, knight-ſervice on horſeback; and the term of each feudal grant was declared to be *jure hæreditario.* This latter circumſtance muſt have had a very conſiderable effect in quieting the minds of men, reſpecting the nature of this new eſtabliſhment. The Saxon feuds, being perhaps beneficiary, and only for life, were at once converted into inheritances; and the Normans obtained a more permanent intereſt in their new property, than probably they had before enjoyed in their antient feuds.

From theſe two ſtatutes were deduced the conſequences of tenure: from theſe a new ſyſtem of law ſprung up, by which the landed property of the kingdom was entirely governed till the middle of the laſt century, and is, in ſome degree, influenced even at this day. The Norman lawyers, who were verſed in this kind of learning, exerciſed their talents in explaining its doctrines, its rules, and its maxims; and at length eſtabliſhed, upon artificial reaſoning, moſt of the refinements of feudal juriſprudence.

By the operation of theſe two ſtatutes, the Saxon diſtinction between Bocland and Folcland, charter-land and allodial, with the *trinoda neceſſitas*, and other incidents, was totally aboliſhed; and all the *liberi homines* of the kingdom, on a ſudden, became poſſeſſed of their land under a tenure which bound them, in a feudal light, mediately or immediately to the king. Thus, if *A.* had received his land of the

the king, and *B.* had received his of *A.*; *B.* now held his land of *A.* on the same terms, and under the same obligations, that *A.* held his of the king; each considering himself under the reciprocal obligation of lord and tenant. In this manner it became a maxim of our law, that all land was held mediately or immediately of the king, in whom resided the *dominium directum*; while the subject enjoyed only the *dominium utile*, or the present cultivation and fruits of it.

Nature of tenures.

This position led to consequences of the greatest importance. Military service being required by an express statute, the other effects of tenure were deductions from the nature of that establishment. As all the king's tenants were supposed to have received their lands by the gift of the king, it seemed not unreasonable, that, upon the death of an ancestor, the heir should purchase a continuance of the king's favour, by paying a sum of money, called *a relief*, for entering into the estate. As he would be bound to the same service to which his ancestor was liable, and which was the only return that could be made in consideration of his enjoying the property, it seemed reasonable that the king should judge, whether he was capable, by his years, of performing the services: if not, that *he*, as lord, should have the *custody of the land* during the infancy; by the produce of which he might provide himself with a sufficient substitute, and in the mean time have the care or *wardship* of the infant's person, in order to educate him in a manner becoming the character he was to support as his tenant. If the ward was a female, it seemed equally material to the lord, that she should connect herself in marriage with a proper person; so that the disposal of her in *marriage* was also thought naturally to belong to the lord.

The obligation between lord and tenant so united their interests, that the tenant was likewise bound to afford *aid* to his lord, by payment of money on certain emergent calls respecting himself or his family; namely, *when he married*

*ried his daughter, when he made his ſon a knight, or when he was taken a priſoner.*

BESIDES theſe incidents, it was held that land ſhould *eſcheat*, or fall back into the hands of the lord, for want of heirs of the tenant, or for the commiſſion of certain crimes; and, in caſes of treaſon, that it ſhould come into the hands of the king by *forfeiture*.

THESE were the fruits and conſequences the king expected to receive from the doctrine of tenure; theſe he demanded as lord from his tenants; and they, in the character of lords, exacted many of the like kind from theirs. In this manner was the feudal bond rivetted on the landed property of the whole kingdom.

Different kinds of tenures.

THUS far of the nature of tenures in general: but tenure was of two kinds; tenure by *knight-ſervice*, and tenure in *ſoccage*. Tenure by knight-ſervice was, in its inſtitution, purely military, and the genuine effect of the feudal eſtabliſhment in England[z]: the ſervices were occaſional, though not altogether uncertain, each ſervice being confined to forty days. This tenure was ſubject to *relief*, *aid*, *eſcheat*, *wardſhip*, and *marriage*. *Soccage* was a tenure by any conventional ſervice not military. Knight-ſervice contained in it two ſpecies of military tenure; *grand* and *petit ſerjeanty*. Under tenure in ſoccage may be ranked two ſpecies; *burgage*, and even *gavelkind*, though the latter has many qualities different from common ſoccage. Beſides theſe, there was a tenure called *frankalmoigne*. This was the tenure by which religious houſes and religious perſons held their lands; and was ſo called, becauſe lands became thereby exempt from all ſervice, except that of prayer and religious duties. Such perſons were alſo ſaid to hold *in liberâ eleemoſynâ*, or in free alms.

THUS far of free-tenure, by which the *liberi homines* of the kingdom became either tenants by knight-ſervice, or in common ſoccage. It is thought, that the condition of the

[z] Wright Ten. 140.

lower

lower order of *ceorls* [h], who among the Saxons were in a state of bondage, received an improvement under this new polity. Nothing is more likely [i] than that the Normans, who were strangers to any other than a feudal state, should, to a certain degree, enfranchise such of those wretched persons as came into their power, by permitting them to do *fealty* for the scanty subsistence which they were allowed to raise on their precarious possessions; and that they were permitted to retain their possession on performing the ancient services. But, by doing fealty, the nature of their possession was, in construction of the new law, altered for the better; they were by that advanced to the character of *tenants;* and the improved state in which they were now placed, was called the tenure of *villenage*. Elevated to this consideration, they were treated with less wantonness by their lords, who, after receiving their *fealty*, could not in honour or conscience deprive them of their possessions, while they performed their services. But the conscience and honour of their lord was their only support. However, the acquiescence of the lord, in suffering the descendants of such persons to succeed to the land, in a course of years advanced the pretensions of the tenant in opposition to the absolute right of the lord; till at length this forbearance grew into a permanent and legal interest, which, in after-times, was called *copyhold tenure* [k].

Villenage.

Copyholds.

The military service due from tenants underwent an alteration in the reign of Henry II. The attendance of a knight only for forty days, was very inadequate to the grand purposes of war; which, besides the delay from unavoidable accidents, often consisted in many tedious operations, before an expedition could accomplish its end: while, on the other hand, that short service was highly inconvenient to the tenant; who, perhaps, came from the northern parts of this kingdom to perform his service in a province of France.

[h] P. 5. [i] Wright Ten. 216. [k] Ibid. 220.

Sensible

Of eſcuage.

SENSIBLE of theſe inconveniences, Henry II. in the fourth year of his reign, deviſed a commutation for theſe ſervices, to which was given the name of *eſcuage*, or *ſcutage*. He publiſhed an order, that ſuch of his tenants as would pay a certain ſum, ſhould be exempted from ſervice, either in perſon or by deputy, in the expedition he then meditated againſt Tholouſe. This ſort of compromiſe was afterwards continued; and *tenure by eſcuage* became a new ſpecies of military tenure, ſpringing from the advantage ſome tenants by knight-ſervice had taken of this propoſition[1] made by the king.

IN the ſame reign, a remiſſion of the old ſervice, which had in ſome degree been conceded by Henry I. was ratified to ſoccage tenants; who grew now into the habit of paying a certain ſum in money, inſtead of rents in kind.

Conſequences of tenure.

HAVING ſo far conſidered the quality or conditions of tenure, as introduced by the Norman ſyſtem; let us now examine the nature of that *eſtate* or intereſt a perſon might have in land, together with ſuch incidents of ownerſhip as naturally occur upon reflecting on property. The polity of tenures tended to reſtrict men in the uſe of that, which, to all outward appearance, was their own. When the land of the Saxons was converted from allodial to feudal, as above deſcribed, it could no longer be aliened without the conſent of the lord, nor could it be diſpoſed of by will. Theſe, with other ſhackles, ſat heavy upon the poſſeſſors of land; nor were at laſt removed, but by frequent and gradual alterations, during a courſe of ſeveral centuries. The hiſtory of theſe alterations in the deſcent, alienation, and other properties of feuds, is wrapt in obſcurity during this early period; however, we will endeavour to trace ſuch circumſtances relating to it, as can be collected from the ſcanty remains of antiquity.

Of primogeniture.

BY the introduction of tenures, there is no doubt but *primogeniture*, or a deſcent of land to the eldeſt ſon, began to prevail; yet it is found, that as low down as the reign

[1] A. D. 1159. Vide Spelm. Cod. in Wilk. Leg. p. 321.

of

of Hentry I. [m], the right of primogeniture was so feeble, that, if there were more than one son, the succession was divided, and the eldest son took only the *primum patris fœdum* [n]; the rest being left to descend to the younger son or sons: but this soon went out of use, or was altered by some statute now lost; for in the reign of Henry II. the eldest son was considered as sole heir: and so fixed was his right of succession to an inheritance held by his ancestors, that it could not be disappointed by alienation. Thus stood the law with regard to tenures by knight-service; but the same reasons not holding with respect to soccage-lands, they were not subject to the same law; for so late as the reign of Henry II. the sons succeeded to soccage-lands *in capita* equally; but the capital messuage was to go to the eldest son; for which, however, he was to make proportionate recompence to the others. But this partible inheritance in soccage-land was not universal; for, if it was not by custom divisible [o], the eldest son was heir to the whole. Both in knight's-service and soccage, if a person died leaving only daughters, they all succeeded jointly and equally, the capital messuage being given to the eldest daughter, upon the terms above-mentioned.

The right of *representation* in prejudice of proximity of blood, though, perhaps, not an unlikely consequence of the legal notion of primogeniture, did not so soon establish itself. The minds of men revolted at a rule which gave the inheritance to an infant, only because he represented the person of his father, in exclusion of the uncle, who was nearer of blood to the grandfather, from whom the fee descended; especially when regard must be had to the calls of military service, which an infant tenant was not capable of performing. If to these considerations we add the little tenderness that was shewn to the titles of such feeble claimants in those days of violence and oppression, we can easily account for

[m] Leges 17.
[n] Hale's Hist. Com. Law, 255.
[o] Si non antiquitús divisum. Glanv. lib. 7. c. 3.

the

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the slow progress which was made towards establishing the right of representation.

With all these reasons against it, representation was not admitted as a rule of descent, even so low down as the reign of Henry II. Glanville states this very point, as a matter concerning which there was a variety of opinions in his time. A man, says he, dies leaving a younger son, and a grandson by his elder son; and it was a question between the son and the grandson who should succeed. Glanville seems to think, that if the eldest son had been *foris-familiated*, that is, provided for by a certain appointment of land at his own request, the grandson should have no claim against his uncle respecting the remainder of the inheritance of the grandfather; though perhaps the eldest son might himself, had he survived [p].

As the descent of crowns kept pace with the descent of private feuds, we may, from this doubt in Glanville, be able to account for the conduct of king John in excluding his nephew Arthur from the throne; and from the different opinions which were then held concerning it, we may collect, that he had some colour of right and law for what he did; the rules of inheritance, as to the point then in question, not being precisely ascertained and settled. In France, where the right of representation had more generally obtained, that king was clearly esteemed an usurper; and as such, his title denied and opposed. In England, where that mode of descent had not yet been fully fixed, he was more generally held to be in lawful possession; or, at least, the objection to his right was such as admitted much debate and question. At what precise time these doubts were removed, and representation became universally regarded as a rule of descent, can only be conjectured. Probably, in the latter part of this very reign, when such a notorious event was recent, and had brought the subject under examination, our law of descents received this new modification from the Continent [q].

[p] Lib. 7. c. 3.

[q] Dalr. Feud. 212.

When

When the succession of collaterals first took place, and when representation amongst collaterals, is involved in equal obscurity; we only know, that in the time of Henry II. the law was settled in this manner. In default of lineal descendants, the brothers and sisters came in; and if they were dead, their children; then the uncles[r], and their children; and lastly, the aunts[s], and their children; observing still the above distinction between knight's-service and soccage, and between males and females[t].

The law of feuds prevailed in this country as a custom, grounded upon the admission of the 52d and 58th laws of William the Conqueror. The particular rules and maxims of it gained footing imperceptibly, borrowed perhaps from foreign systems, but more commonly deduced by the analogy of technical reasoning. The effect of them upon our land is seen and known; but their source, or the time of their origin, is too remote and obscure to be pursued at this day[u].

Of alienation.

The restraint on alienation was a striking part of the feudal polity. This restraint was partly in favour of the superior lord, and partly in favour of the heir of the tenant. Whichsoever of these considerations imposed the first restriction, it is certain the first relaxation of it contained a caution that regarded the interest of the heir. A law of Henry I. says, *Acquisitiones suas det cui magis velit; si Boc-land autem habeat, quam ei parentes sui dederint, non mittat eam extra cognationem suam*[x]. This permission, which enabled a man to disappoint his children of his lands *purchased*, was qualified in the time of Henry II.; for then it was laid down for law, that a man should alien only part of his purchased land, and not the whole, because he should not *filium suum hæredem exhæredare*. But if he had neither son nor daughter, he might then alien a part, or even the whole, in fee[y]. And though he had children, he might alien all

[r] *Avunculi.*
[s] *Materteræ.*
[t] Glanv. lib. 7. ca. 4.
[u] *Ingrediturque solo, et caput inter nubila condit.*
[x] Leg. Hen. I. 70.
[y] Glanv. lib. 7. c. 3.

his

his purchaſed lands; *provided* he had alſo lands by inheritance, out of which his children might be portioned. It was thought reaſonable, that a man ſhould have liberty to diſpoſe of ſuch lands as he had, by his own purchaſe, procured to himſelf; but the genius of this law would not ſo far diſpenſe with its uſual ſtrictneſs, as to allow him altogether to diſinherit his children.

THE alienation of purchaſed lands led to the alienation of lands coming by deſcent; but this was under certain qualifications, and not without the like reſtraints which we have before mentioned in the caſe of purchaſed lands. Part only of an inheritance, which had deſcended through the family, could, in the reign of Henry II. be given to whomſoever the owner pleaſed; ſo that, upon the whole, a perſon in his life-time might, in ſome caſes, diſpoſe of all his purchaſed lands, and a reaſonable part of thoſe taken by deſcent, but could give neither of them by will [z].

IT is an opinion, that [a] alienation firſt became frequent in burgage-tenures. It ſeems as if the holding in them was never very ſtrict; and, as perſons living in that ſort of ſociety ſooner got looſe from an habitual reverence for tenure, and, from their occupation, ſtood in need of a more exchangeable property, it is probable, alienations might happen there more early than among other tenants.

WHEN alienations had become eſtabliſhed in burgage-tenures, the alienation of purchaſed lands in many inſtances, and of lands deſcended in ſome, was by degrees permitted, as we have before ſeen. All theſe alterations broke in upon the original notion of tenure and its qualities; and in the reign of king John prevailed to ſuch a degree, as to occaſion the reſtrictions impoſed by the Great Charter. Thus far of tenures and their incidents, of which we ſhall take our leave for the preſent [b].

THE

[z] Glanv. lib. 7. c. 3.
[a] Dalr. Feud. Prop. 99.
[b] Such is the ſhape which the feudal polity, after its introduction into this country, gradually aſſumed. This ſingular ſyſtem has, of late, been much

THE judicature of the kingdom was thrown into a ſyſtem conformable to the new polity. The objects which firſt preſent themſelves, on contemplating the introduction of

much diſcuſſed by writers on the Engliſh law and conſtitution; who, in order to procure every light that could illuſtrate the ſubject, have purſued their inquiries beyond the limits of the law of this country; have entered into the riſe and progreſs of feuds among the northern nations in their different ſettlements, particularly in France; have examined the nature and deſign of the ſeveral ſpecies of tenures, and inveſtigated with minuteneſs their diſtinct incidents and properties. This has introduced a new branch of ſtudy among the ſtudents of the common law; which, like other novelties, has been followed with great avidity; and I am ready to admit, that the knowledge of our law and conſtitution has been thereby greatly promoted. It is not then through any diſapprobation of theſe purſuits that I have thus ſhortened the account of the feudal ſyſtem; but for reaſons that, I truſt, will have the ſame weight with the reader which they have had with me. In a hiſtory of the law, a due portion of attention muſt be allotted to each ſubject that comes under conſideration. *Engliſh* feuds are entitled to a ſhare, and, taken in all their branches, will be found to have a very large ſhare of the enſuing Hiſtory. The proſpect of this heap of matter, in addition to numerous other objects, made it neceſſary that every thing extraneous and foreign, every thing that might, perhaps, illuſtrate, but certainly made no part of our common law, ſhould be dropped intirely. Of the latter deſcription are the far greater, and the more entertaining and ſplendid portions of thoſe treatiſes which have lately been written profeſſedly on the feudal ſyſtem. To ſuch, therefore, I muſt beg to refer thoſe who are more curious; I mean, among others, to *Dalrymple*, to *Sullivan*, and to *Wright*; and thoſe who wiſh to go farther, to *Spelman*, to *Craig*, to *Corvinus*, to *Zaſius*, and to *the Two Books of Feuds*.

The reader of the Hiſtory of Engliſh Law, pauſing, as he now does, at the period of the Conqueſt, and, looking down to the preſent time, thro' the ages of Glanville and Bracton, Britton and Fleta, the Statutes, the Year-Books, and the Reporters, muſt feel that he, as well as the writer, has enough upon his hands, without engaging in any curious inquiry about the origin and nature of the feudal ſyſtem in general; he will alſo perceive that this topic, compared with the numerous and important objects that crowd on his imagination, is ſmall and inconſiderable.

When I ſay ſmall and inconſiderable, I beg to be underſtood in the ſenſe which many are too apt to give to the term *feudal ſyſtem*. Perſons who moſt inſiſt upon this point ſeem to exclude from it every thing that is *Engliſh*; and it can be in no other ſenſe of it that the preſent Hiſtory has been thought, as I am told, to contain too little diſcuſſion upon the feudal ſyſtem. Why the feudal ſyſtem, in this new-fangled ſenſe, ſhould make ſo ſmall a part of the preſent Hiſtory, can be eaſily accounted for by the reader of it.

Feuds, properly ſo called, namely thoſe at the will of the lord, were no part of the ſyſtem eſtabliſhed by William; his famous law expreſsly declares, that he had granted them *jure hæreditario*. The uncertain caſualties of tenures were ſoon aſcertained by expreſs charters of liberties, repeatedly granted by our Norman kings. On the death of the anceſtor, the fee was *caſt* upon the heir by conſtruction of law, who entered as into a patrimonial,

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of Norman judicature, are the ſeparation of the eccleſiaſtical from the temporal court, and the eſtabliſhment of the *curia regis*. By an ordinance of William the Conqueror, the

nial, not a feudal property. Such was the law of Engliſh tenures, at their earlieſt appearance; and to this it is to be attributed, that through all our Law-books and Reports, from Bracton to Coke, and further down, there is no alluſion, no reaſoning, that bears any relation to feuds or feudal law, in this ſenſe of it; and thoſe who have arraigned Lord Coke for his ſilence on this head, have paſſed, in my mind, a very haſty judgment on the extent of that great lawyer's learning.

Comparing the above ſenſe of feudal, with this account of our tenures, every idea that is Engliſh is not improperly excluded from that ſyſtem; and that ſyſtem is very properly excluded from a Hiſtory of the Engliſh Law; the perſons therefore who hold the above language, ought not to mention this as a defect in the preſent work.

*Scotch writers.*

But this ſenſe of feudal ſeems to me too narrow and partial; and I ſhould think it owes its application more eſpecially to ſome Scotch writers, who have lately taken a lead in hiſtorical inquiries; and who, imagining they had brought to light certain principles and foundations of Engliſh law, of which Engliſh lawyers were ignorant, are never ſatisfied with diſplaying this ſuppoſed triumph. But the want of diſcernment, upon this point of juridical hiſtory, is in themſelves, and not in us. It is indeed true, that the Scotch law is ſtrictly feudal. It was ſo in its foundation; and it ſeemed the employment of lawyers to give a feudal turn to every conſideration that could ariſe on the modifications of property. New feudal fancies were adopted; the moſt ſimple points were diſtorted to apply them to feudal principles; matters in which the Engliſh and Scotch law agreed were diſfigured by the ſuperinduction of ſome feudal device. This affectation has prevailed among lawyers almoſt down to the preſent day; and it is not to be much wondered, that perſons who conſider this ſubject hiſtorically, ſeeing how little change had been made in their law during ſo many centuries, and that lawyers, by referring continually to firſt feudal principles, had rather been going backwards than proceeding, ſhould lay ſuch great ſtreſs upon the ſtudy of feuds in their firſt origin. But they carry the prejudices of their countrymen too far, when they expect the ſame line to be taken by Engliſh lawyers who make ſimilar enquiries into the hiſtory of *their* juriſprudence.

If the Scotch law has been corrupted by too great attention to feudal principles, the only natural way of accounting for difficulties and obſcurities in it, is by recurring to the ſame ſources. Thoſe too who ſtudy the Hiſtory of Engliſh Law, muſt tread in the footſteps of the old Engliſh lawyers; but theſe lead not to the *Books of Feuds*, much leſs to *Craig* or *Corvinus*. The lawyers of this country, like the people, impatient of foreign innovations, ſoon moulded the inſtitutions of Normandy into a new ſhape, and formed a ſyſtem of feuds of their own. The uſage and cuſtom of the country became the guide of our courts; who have invariably rejected with diſdain all arguments from the practice of other countries.

For a knowledge of the feudal ſyſtem, as far as concerns an Engliſh lawyer, we are to look no farther than *Glanville*, *Bracton*, and *Littleton*. And as far as it is to be collected from the works of theſe and other Engliſh lawyers, *the feudal ſyſtem of England* reſpecting landed property, is diſcuſſed in this and the ſubſequent parts of this Hiſtory (as I ſhould think) at as great length as could conveniently be done conſiſtent

the biſhop, with all eccleſiaſtical cauſes, was ſeparated from the ſheriff; and the ealderman, or earl, receiving a feudal character, begun to hold his county court as the feudal lords did theirs. This was done by the *ſheriff*, who, ſoon after the Conqueſt, if not before, grew to be a different perſon from the *earl*. The periodical circuits henceforth ceaſed, and the county court and tourn were held in a certain place. In the former, the *vicecomes* or ſheriff, acting for the earl, uſed to preſide, and the freeholders, as before, were judges of the court. The latter, notwithſtanding the abſence of the biſhop, ſoon afterwards received new ſplendor and importance from a law of Henry I. which required all perſons, as well peers as commoners, clergy as well as laity, to give attendance there, to hear a charge from the ſheriff, and to take the oath of allegiance to the king.

conſiſtent with the plan of ſuch a work. If it is wiſhed that this ſhould be compared with the like ſyſtem in Scotland, in France, in Lombardy, or elſewhere, I can only ſay, that ſuch an inquiry does not ſeem to me to ſuit a work like the preſent, though it would be very proper in a general hiſtory of feudal law.

It is not only on the ſubject of feuds that I have ſtudiouſly avoided any inquiry beyond the pale of the Engliſh law; in many other inſtances, where the Engliſh ſyſtem might ſeem, in a very particular manner, to coincide with, or interſect any foreign ſcheme of juriſprudence, I have invariably forborne making ſuch obſervations, as a compariſon of the two ſubjects would eaſily ſuggeſt. The deſign of this Hiſtory ſeemed to make it abſolutely neceſſary to adhere to this plan. To inveſtigate the firſt principles of our law, and to purſue them through all the modifications and applications, all the additions and changes to which they were ſubjected in different periods of time, is an enquiry that called upon the writer rather to reduce and ſimplify his materials, than to ſeek for new ones, or extend his views. That the reſult of ſuch an enquiry might be delivered to the Reader with fidelity, I thought it ſafer to abſtain altogether from topics of a foreign nature, confining myſelf to ſuch as have, in their turn, prevailed in our courts, and among practicers. It was the latter upon which the utility of the preſent hiſtorical proceſs was to depend; and the leſs they were mixed with the former, the deduction would be more eaſy, and every concluſion ariſing from it would be better founded.

This had become more eſpecially neceſſary with reſpect to the feudal ſyſtem. The preſent faſhion of treating this ſubject, if it had taught ſomething uſeful, had alſo taught much that was to be unlearned. *Glanville* and *Craig*, *Bracton*, and *the Book of Feuds*, have been quoted in a promiſcuous manner, as if thoſe authors wrote upon the ſame ſyſtem of feuds. Thus is the ſtudent's mind bewildered with accounts of a polity made up from different countries, and prevailing in none; and, after all, is left uninformed what is the genuine nature of *Engliſh feuds*. It ſeems, therefore, a new and very material object to a writer of the Engliſh law, to give an account of *the feudal ſyſtem* in England, from Engliſh authors alone.

This

This obliged the greateſt lords of the kingdom to ſubmit to frequent remembrances of their ſubordinate ſtation; and ſo contributed to draw cloſer the bands of political union. In other reſpects, theſe old Saxon courts ſeemed to continue in their original ſtate. In the county court were held civil pleas; and in the tourn were made all criminal enquiries. Every manor had its court baron, where the lord was to hold plea and tranſact matters reſpecting certain rights and claims of his own tenants, and for the puniſhment of nuiſances and miſdemeanors ariſing within the manor; from all which courts, on failure of juſtice, there lay an appeal to the ſheriff's court, and from thence to the king's ſupreme court. Many lords had franchiſes to hold hundred and other courts, both civil and criminal; and there are ſome few inſtances, where the crown had granted to a great lord the *jura regalia* of a certain diſtrict; erecting it into a county palatine, diſtinct from, and excluſive of, all juriſdiction of the king's courts. William granted the county of Cheſter to *Henry Lupus; hanc totum comitatum tenendum ſibi et hæredibus ita liberè ad gladium, ſicut ipſe rex tenebat Angliam ad coronam.* The like ample grant was ſoon after made of the biſhopric of Durham to that prelate; and in later times grew up the franchiſe of Ely and Hexham, the counties palatine of Lancaſter and of Pembroke *.

The curia regis.

THE ſupreme court of ordinary judicature eſtabliſhed by William the Conqueror, was the *aula regis*, or *curia regis*; ſo called, becauſe it was held in the king's palace, before himſelf, or his juſtices, of whom the *ſummus juſtitiarius totius Angliæ* was chief. There was alſo the exchequer, called *curia regis ad ſcaccarium*[c]; which was held likewiſe in the king's palace, either before the king or his grand juſticiary; and, though in effect a member of the *curia regis*, was expreſsly diſtinguiſhed from it. In what manner the grand juſticiary, who preſided in both theſe courts, ordered or diſtributed between them the ſeveral pleas inſtituted there,

* Vid. 4 Inſt. 211.

[c] Wilk. Leg. Sax. 288. p.

or

or in what manner these pleas were conducted, it is difficult at this distance of time precisely to determine[d]. Respecting the nature of this obsolete judicature little more can be hoped than such conjectures as may be founded on the few remaining monuments of antiquity.

THE *curia regis* consisted of the following persons: the king himself was properly head, and next to him was the grand justiciary, who, in his absence, was the supreme head of the court: the other members of this court were the great officers of the king's palace; such as the treasurer, chancellor, chamberlain, steward, marshal, constable, and the barons of the realm. To these were associated certain persons called *justitiæ*, or *justitiarii*, to the number of five or six; on whom, with the grand justiciary, the burthen of judicature principally fell; the barons seldom appearing there, as little valuing a privilege attended with labour, and the discussion of questions ill-suited to their martial education. The justices were the part of this court that was principally considered, as appears by the return of writs, which was *coram me vel justitiis meis;* unless that appellation may be supposed to include every member thereof in his judicial capacity.

ALL kinds of pleas, civil and criminal, were cognizable in this high court[e]; and not only pleas, but other legal business arising between parties was there transacted. Feoffments, releases, conventions, and concords of divers kinds were there made, especially in cases that required more than common solemnity[f]. Many pleas, from their great importance, were proper subjects of enquiry there; others were brought by special permission of the king and his justices.

THE course of application to the *curia regis* was of this nature. The party suing paid, or undertook to pay, to the king a fine to have *justitiam et rectum* in his court: and

[d] Mad. Ex. 57. [e] Ibid. 70. [f] Ibid. 77.

thereupon he obtained a writ or precept, by means of which he commenced his ſuit; and the juſtices were authorized to hear and determine his claim. Theſe writs were made out in the name and under the ſeal of the king, but with the *teſte* of the grand juſticiary; for the making and iſſuing of which (as well as for other offices) the king uſed to have near his perſon ſome great man, uſually an eccleſiaſtic, who was called his *chancellor*, and had the keeping of his ſeal: under the chancellor were kept clerks for making theſe writs. It was probably this office of the chancellor that rendered him a neceſſary member of the *curia regis*; to which, in fact, and to the juſtices, and not to the king, ſuitors made their complaint, and, upon paying the uſual fine, were referred to the chancellor to furniſh them with a writ.

As the old eſtabliſhment of the Saxons for determining common pleas in the county court was continued, very few of thoſe cauſes were brought into the *curia regis*. While men could have juſtice adminiſtered ſo near their homes, there was no temptation to undergo the extraordinary expence and trouble of commencing actions before this high tribunal; but the partiality with which juſtice was adminiſtered in the courts of arbitrary and potent lords, often left the king's ſubjects without proſpect of redreſs in the inferior juriſdictions: the king and the *curia regis* became then an aſylum to the weak. It is not remarkable, that ſuitors coming to a court under ſuch circumſtances ſhould conſent to purchaſe the means of redreſs by paying a fine. Upon ſuch terms was the *curia regis* open to all complainants; and the inſtitution of ſuits was eagerly encouraged by the officers of that court.

THE exchequer was a ſort of *ſubaltern* court, reſembling in its model that which was more properly called the *curia regis*. Here, likewiſe, the grand juſticiary, barons, and great officers of the palace preſided. The perſons who were juſtices in the *curia regis*, acted in the ſame capacity here;

here; this court being very little elſe than the *curia regis* ſitting in another place, namely, *ad ſcaccarium*; only it happened, that the juſtices, when they ſat at the exchequer, were more uſually called *barons*. The adminiſtration of juſtice in thoſe days was ſo commonly attendant on the rank and character of a baron, that *baro* and *juſtitiarius* were often uſed ſynonimouſly [g].

AFFAIRS of the revenue were the principal objects of conſideration in the court of exchequer. The ſuperintendance of this was the chief care of the juſticiary and barons: the cognizance of a great number of matters followed as incident thereto; as the king's revenue was, in ſome way or other, concerned in the fees, lands, rights, and chattels of the ſubject; and ultimately in almoſt every thing he poſſeſſed.

HOWEVER, it is thought the court of exchequer was not ſo confined to the peculiar buſineſs aſſigned it, and its incidents, as not to entertain ſuch ſuits of a general nature as were uſually brought in the *curia regis* [h]: and it is probable, this uſage of holding common pleas at the exchequer continued till the time when common pleas were ſeparated [i] from the *curia regis*; and that both courts ceaſed to hold plea of common ſuits at the ſame time, and by the ſame prohibition. Other legal buſineſs, like that in the *curia regis*, was alſo tranſacted at the exchequer: charters of feoffment, confirmation, and releaſe, final concords, and other conventions, were executed there before the barons [k]; all which, added to the conſideration that the conſtituent members were the ſame, put the court of exchequer very nearly on an equality with the *curia regis*.

BY the multifarious and increaſing buſineſs of theſe two courts, the grand juſticiary and his aſſeſſors on the bench found themſelves fully occupied; and as the application to

[g] Mad. Ex. 134.
[h] Ibid. 141.
[i] By the Great Charter.
[k] Mad. Ex. 145.

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Juſtices itinerant.

theſe courts became more frequent, it was judged neceſſary, both in aid of themſelves and in relief of ſuitors, to creſt ſome other tribunal of the ſame nature. Accordingly juſtices were appointed to go *itinera*, or circuits through the kingdom, and determine pleas in the ſeveral counties. To theſe new tribunals was given a very comprehenſive juriſdiction. As they were a ſort of emanations from the *curia regis* and exchequer, and were ſubſtituted in ſome meaſure in their place (except with the reſervation of appeal thereto) they were endowed with all the authorities and powers of thoſe courts. Theſe *juſtices itinerant* or *errant*, in their ſeveral *itinera*, or *eyres*, held plea of all cauſes, whether civil or criminal, and in moſt reſpects diſcharged the office of both the ſuperior courts. The characters of the perſons entruſted with this juriſdiction were equal to the high authority they exerciſed; the ſame perſons who were juſtices in the king's court being, amongſt others, juſtices itinerant. They acted under the king's writ in nature of a commiſſion; and they went generally from ſeven years to ſeven years; though their circuits ſometimes returned at ſhorter intervals. Their circuits became a kind of limitation in criminal proſecutions, as no one could be indicted for any thing done before the preceding *eyre*.

THE adminiſtration of juſtice in the county and other inferior courts, notwithſtanding ſome ſtriking advantages, was certainly pregnant with great evils. The freeholders of the county, who were the judges, were ſeldom learned in the law; for, although not only they, but biſhops, barons, and other great men, were, by a law of Henry I. appointed to attend the county court (by which they might, after time and obſervation, qualify themſelves to act in the office of magiſtrates), the ſtudy and knowledge of the laws was confined to a very few. Again, the determinations of ſo many independent judges, preſiding in the ſeveral inferior courts diſperſed about the country, bred great variety in the laws, which, in proceſs of time, would have habituated

habituated different counties to different rules and cuſtoms, and the nation would have been governed by a variety of provincial laws. Beſides theſe inherent defects, it was found that matters were there carried by party and paſſion. The freeholders, often previouſly acquainted with the ſubjects of controverſy, or with the parties, became heated and intereſted in cauſes; which, added to the influence of great men, on whom they were too much dependent by tenure or ſervice, rendered theſe courts extremely unfit for cool deliberation and impartial judgment. Nor were theſe difficulties remedied by the power of bringing writs of falſe judgment, and thereby removing a cauſe into the *curia regis*, though the penalty of amercement on the ſuitors of the county court, for errors in judgment, was ſufficiently ſevere. If theſe objections lay againſt the king's courts in the county, much more did they againſt thoſe of great lords; who made the awards of juſtice ſubſervient to their own ſchemes of power and aggrandiſement.

Besides theſe, there were reaſons of a political nature which dictated an eſtabliſhment of this kind: this was, to obviate the miſchiefs ariſing to the juſt prerogatives of the crown from the many hereditary juriſdictions introduced under the Norman ſyſtem. A judicial authority exerciſed by ſubjects in their own names, muſt conſiderably weaken the power of the prince; one of whoſe moſt valuable royalties, and that which moſt conciliates the confidence and good inclinations of his people is, the power of providing that juſtice ſhould be duly adminiſtered to every individual. Though the appeal from the hundred to the court of the ſheriff (an officer of the king) ſo far kept a check upon the juriſdiction of lords, yet it was ſtill to be wiſhed that the inconvenience of appeals ſhould be precluded, and that juſtice ſhould be adminiſtered in the firſt inſtance by judges deriving their commiſſion from the king[1]. If theſe reaſons induced the crown to promote

[1] Litt. H-o. II. vol. 5. 273.

ſuch

such an inſtitution as this; the ſtate of things in the country was ſufficient reaſon with the people to deſire, with the moſt ardent wiſhes, the occaſional viſits of a regal juriſdiction, like that of the *eyre*.

IT is not eaſy to determine the exact period when this eſtabliſhment of *juſtices itinerant* was firſt made. It has long been the common opinion, that they were firſt appointed in the great council held at Nottingham, or, as ſome ſay, at Northampton, in the twenty-ſecond year of Henry II. A. D. 1176, when the king, by the advice of the great council, divided the realm into ſix circuits, and ſent out three juſtices in each to adminiſter juſtice.

IT is true, that the firſt mention of theſe juſtices, in our old hiſtorians is under this year; but it has been proved from the authority of records in the exchequer [m], that there had been juſtices itinerant, to hear and determine civil and criminal cauſes, in the eighteenth year of the reign of Henry I. and likewiſe juſtices in eyre for the pleas of the foreſt. It alſo appears by the ſame authority, that in the twelfth, and from thence to the ſeventeenth of king Henry II. A. D. 1171, juſtices of both kinds had been conſtantly ſent into the ſeveral counties. It is thought [n], that the firſt appointment of juſtices itinerant was made by Henry I. in imitation of a like inſtitution in France, introduced by Louis le Gros; that in the reign of king Stephen, continually agitated by inteſtine commotions, this new-adopted improvement was dropped; and was again revived by Henry II. who at length fixed it as a part of our legal conſtitution. It appears from the records above alluded to, that during great part of the reign of Henry II. pleas were held in the counties by the juſtices itinerant from year to year.

THE *itinera*, or circuits appointed at the council of Northampton were ſix; on each of which went three juſtices. The counties aſſigned to each of theſe circuits were

[m] Mad. Ex. 96. [n] Litt. Hen. II. vol. 4. 271.

as

as follow: in one, the counties of *Norfolk*, *Suffolk*, *Cambridge*, *Huntingdon*, *Bedford*, *Buckingham*, *Eſſex*, *Hertford*; in another, *Lincoln*, *Nottingham*, *Derby*, *Stafford*, *Warwick*, *Northampton*, *Leiceſter*; in another, *Kent*, *Surrey*, *Southampton*, *Suſſex*, *Berks*, *Oxford*; in another, *Hereford*, *Gloceſter*, *Worceſter*, *Salop*; in another, *Wilts*, *Dorſet*, *Somerſet*, *Devon*, *Cornwall*; in another, *York*, *Richmond*, *Lancaſter*, *Copland*, *Weſtmoreland*, *Northumberland*, *Cumberland*.

About three years after this (A. D. 1179), ſome alteration was made in this arrangement of *itinera*; for, at a great council held at Windſor, the kingdom was parcelled out into four circuits only, in the following order, in the firſt were the counties of *Southampton*, *Wilts*, *Gloceſter*, *Dorſet*, *Somerſet*, *Devon*, *Cornwall*, *Berks*, *Oxford*; in the ſecond, *Cambridge*, *Huntingdon*, *Northampton*, *Leiceſter*, *Warwick*, *Worceſter*, *Hereford*, *Stafford*, *Salop*; in the third, *Norfolk*, *Suffolk*, *Eſſex*, *Hertford*, *Middleſex* (the county of *Middleſex* not being included in the former diviſion at all), *Kent*, *Surrey*, *Suſſex*, *Buckingham*, *Bedford*; in the fourth, *Nottingham*, *Derby*, *York*, *Northumberland*, *Weſtmoreland*, *Cumberland*, *Lancaſter*. As each of theſe *itinera* contained more counties than the former diviſion, they had alſo more juſtices aſſigned: the firſt three had each five juſtices; and the laſt, which was much the greateſt circuit, had ſix[o]. There is no mention of any further alteration of the circuits during the period of which we are now treating.

The juſtices appointed in the year 1176, were directed and impowered to do, in their *itinera*, all things of right and juſtice which belonged to the king and his crown, whether commenced by the king's writ or that of his vicegerent, where the property in queſtion was not more than half a knight's fee; unleſs the matter was of ſuch importance that it could not be determined but before the king; or the juſtices themſelves, on account of any difficulty

[o] Vide Leg. Ang. Sax. p. 332, 333.

therein,

therein, chose to refer it to the king, or, in his absence, to those who were acting for him. They were commanded to make inquisitions concerning robbers, and other offenders, in the counties through which they went; they were to take care of the profits of the crown, in its landed estates and feudal rights of various sorts, as escheats, wardships, and the like; they were to enquire into castle-guards, and send the king information from what persons they were due, in what places, and to what amount; they were to see that the castles which the great council had advised the king to destroy, were demolished, under pain of being themselves prosecuted in the king's court; they were to enquire what persons were gone out of the realm, that if they did not return by a certain day to take their trial in the king's court, they might be outlawed; they were to receive, within a certain limited term, from all who would stay in the kingdom, of every rank and condition, (not even excepting those who held by tenures of villenage) oaths of fealty to the king, which if any man refused to make, they were to cause him to be apprehended as the king's enemy; and, moreover, they were to oblige all persons from whom homage was owing, and who had not yet done it, to do it to the king within a certain time, which the justices themselves were to fix.

THE principal part of these injunctions was given in consequence of the late civil war; but some constitutions made at Clarendon, relating both to civil and criminal justice, were renewed at this same council at Northampton; and the justices itinerant then appointed were sworn to observe and execute those regulations in every point. Amongst other provisions of this statute, the justices were to cause recognition to be made whether a man died seised of land concerning which any doubt had arisen; and they were likewise to make recognition *de novis disseisinis* [p].

[p] Litt. Hen. II. vol. 4. 275. 405.

THIS

THIS was the whole authority given to the juſtices itinerant by the ſtatute of Northampton; how the objects of their juriſdiction were multiplied will preſently appear, when we come to mention thoſe ſchedules, called *capitula itineris*, which uſed to be delivered to the juſtices for their direction. In executing the king's commiſſion, the plan of this inſtitution was improved ſtill further; for, that juſtice might not always be delayed in criminal caſes till the juſtices itinerant came into the country, commiſſions uſed to be occaſionally iſſued, empowering the juſtices therein named to make a *delivery of the gaol* ſpecified in the commiſſion; that is, they were, by due legal examination, to determine the fate of all the priſoners, ordering a diſcharge of ſuch who were acquitted upon trial, and continuing in further cuſtody, or otherwiſe directing puniſhments to be inflicted on thoſe who ſhould have been convicted of any crime. But when theſe commiſſions were firſt brought into uſe, it does not appear.

The bench.

IT was ſome time after the appointment of juſtices itinerant that a court made its appearance under the name of *bancum*, or *bench*, as diſtinguiſhed from the *curia regis*. This court, like that of the juſtices in eyre, was probably erected in aid of the *curia regis*; and it is obſervable, that the *curia regis* ceaſed to entertain common pleas in its ordinary courſe, much about the ſame time when the *bancum*, or *bench*, is ſuppoſed to have been erected. It is not likely this alteration was made *uno ictu*, but by degrees. It had evidently been the uſage to hold pleas in the *bank* before the charter of king John, as *juſtitiarii noſtri de banco* are therein mentioned; ſo that the clauſe declaring, that *communia placita non ſequantur curiam noſtram, ſed teneantur in certo loco*, can no otherwiſe be underſtood, than as contributing to ſettle and confirm what had been begun before. In truth, the exiſtence of the *bench*, and of the *juſtitiarii de banco*, appears from records in the reign of Richard I. At that period certain deſcriptions came in uſe which were not

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not before known, and which plainly and clearly mark the existence of such a court; such as, *curia regis apud Westmonasterium*, *justitiarii regis apud Westmonasterium*, or *de Westmonasterio*, *bancum*, and *justitiarii de banco*[q]; from all which it may be collected, that common pleas were at this time moving off from the *curia regis*, and were frequently determined in a certain place, whose style was meant to be described in those expressions.

It has been observed[r], that after the erection of the bank, the style of the superior court began to alter; and the proceedings there were frequently said to be *coram rege*, or *coram domino rege*; and in subsequent times the court was stiled *curia regis coram ipso rege*, or *coram nobis*, or *coram domino rege ubicunque fuerit*, &c. as at this day[s]. However, it was still called *aula regis*, *curia regis*, *curia nostra*, *curia magna*.

As the exchequer was a member of the *curia regis*, and a place for determining the same sort of common pleas as were usually brought into the *curia regis*, the separation of such pleas from that court did considerably affect the exchequer. The clause in king John's charter equally concerned both courts: *curiam nostram* meant the exchequer, as well as the court properly so called.

Thus have we seen this grand institution of the Normans dilating its influence over the whole kingdom, encroaching on the ancient local tribunals of the people, by drawing into its sphere all descriptions of causes and questions; till having exerted, as it were, its last effort, in sending forth the new establishments of justices itinerant and justices of the bench, it disappeared by degrees from the observation of men, and almost from the records of antiquity, having deposited in its retirement the three courts of common law now seen in Westminster-hall; the court *coram ipso rege*, since called *the king's-bench*; the

[q] Mad. Ex. 539. 540. [r] Ibid. 543. [s] Ibid. 544.

*bench*,

*bench*, now called *the common pleas*; and the modern court of *exchequer*.

The chancery.

The court of chancery probably acquired a ſeparate exiſtence much about the ſame time. The buſineſs of the chancellor was to make out writs that concerned proceedings pending in the *curia regis* and the exchequer. He uſed to ſeal and ſuperviſe the king's charters, and, whenever there aroſe a debate concerning the efficacy or policy of royal grants, it was to his judgment and diſcretion that a deciſion upon them was referred. He uſed to ſit with the chief juſticiary and other barons in the *curia regis* and at the exchequer, in matters of ordinary judicature and on queſtions of revenue; though it was to the latter court he ſeemed moſtly allied in his judicial capacity*. Mr. Madox, obſerving that the rolls of chancery begin in the reigns of Richard and John to be diſtinct from thoſe of the exchequer (a method of arrangement not obſerved before)†, is inclined to think that the chancellor began about that time to act ſeparately from the exchequer. In this conjecture he ſtrengthens himſelf by a corroborating fact, as he imagines. In the abſence of king Richard out of the realm, William de Longchamp, chief juſticiary and chancellor, was removed from the former office by the intrigues and management of John earl of Morton, the king's brother. After this, it is thought, he might diſcontinue his attendance at the exchequer; and the buſineſs of the chancery, which before uſed to be done there, might be transferred by him to another place, and put into a new method; in which it might be judged proper and convenient to continue it ever after, ſeparate and independent.

If this conjecture may be admitted, concerning an eſtabliſhment beyond the reach of hiſtoric evidence, the court of chancery was erected into a diſtinct court nearly at the ſame time when the other three received their preſent form and juriſdiction; which will go a great way towards juſtifying one part of the maxim of the common lawyers, that

* Mad. Ex. 131. † Ibid. 132.

the

the four courts of Weſtminſter-hall are all of equal antiquity; thought it *refutes* the other part of it that they have been the ſame as they now are from time immemorial.

THE chancery was the *officina juſtitiæ*, the manufactory, if it may be ſo called, of juſtice, where original writs were framed and ſealed, and whither ſuitors were obliged to reſort to purchaſe them in order to commence actions, and ſo obtain legal redreſs. For this purpoſe the chancery was open all the year; writs iſſued from thence at all times, and the fountain of juſtice was always acceſſible to the king's ſubjects. The manner in which the buſineſs there was conducted, ſeems to have been this: the party complaining to the juſtices of the king's court for relief, uſed to be referred to the chancellor (in perſon, perhaps, originally), and related to him the nature of his injury, and prayed ſome method of redreſs. Upon this, the chancellor framed a writ applicable to the complainant's caſe, and conceived ſo, as to obtain him the ſpecific redreſs, he wanted. When this had been long the practice, ſuch a variety of forms had been deviſed, that there ſeldom aroſe a caſe in which it was required to exerciſe much judgement; the old forms were adhered to, and became precedents of eſtabliſhed authority in the chancellor's office. After this, the making of writs grew to be a matter of courſe; and, the buſineſs there increaſing, it was at length confided to the chancellor's clerks, called *clerici cancellariæ*, and ſince *curſitores cancellariæ*. A ſtrict obſervance of the old forms had rendered them ſo ſacred, that at length any alteration of them was eſteemed an alteration of the law, and therefore could not be done but by the great council. It became not unuſual in thoſe times for a plaintiff, when no writ could be found in chancery that ſuited his caſe, to apply to parliament for a new one.

THUS far the chancellor ſeemed to act as a kind of officer of juſtice, miniſtering to the judicial authority of the king's courts. The chancellor's character continued the ſame,

same, after this separation, as it had been before, without any present increase or diminution. In the reign of Henry II. he was called the second person in the government, by whose advice and direction all things were ordered. He had the keeping of the king's seal; and, beside the sealing of writs, sealed all charters, treaties, and public instruments. He had the conduct of foreign affairs, and seems to have acted in that department which is now filled by the secretaries of state. He was chief of the king's chaplains, and presided over his chapel. His rank in the council was high; but the great justiciary had precedence of him[u]. He is said to have had the presentation to all the king's churches, and the visitation of all royal foundations, with the custody of the temporalties of bishops; but those writers who have taken upon them to speak fully of the office of chancellor, say nothing of any judicial authority exercised by him at this time. In the *curia regis* he was rather an officer than a judge; but as he assisted there, so he was sometimes associated with the justices in eyre[x]. There is no notice, even in writers of a later date than this, neither in *Bracton* nor *Fleta*, that the chancellor, after he sat separate from the exchequer, exercised any judicial authority, or that the chancery was properly *a court*; but it is always spoken of as an *office* merely, bearing a certain relation to the administration of justice, in the making and sealing of writs.

NOTWITHSTANDING the hereditary lords absented themselves so entirely from the *curia regis*, they still retained an inherent right of judicature, which resided in them as constituent members of the council of the king and kingdom. When the *curia regis* was divided, and the departments of ordinary judicature were branched out in the manner we have just seen, the peculiar character of this

Judicature of the council.

[u] Mad. Ex. 42, 43. Lit. Hen. II. vol. 2. 312. [x] Mad. Ex. 42.

council,

council, now separated and retired within itself, became more distinguishable.

THIS council was of two kinds and capacities: in one, it was the national assembly, usually called *magnum concilium*, or *commune concilium regni*; in the other, it was simply the *council*, and consisted of certain persons selected from that body, together with the great officers of state, the justices, and others whom the king pleased to take into a participation of his secret measures, as persons by whose advice he thought he should be best assisted in affairs of importance. This last assembly of persons, as they were a branch of the other, and had the king at their head, were considered as retaining some of the powers exercised by the whole council. As they both retained the same appellation, and the king presided in both, there was no difference in the stile of them as courts; they were each *coram rege in concilio*, or *coram ipso rege in concilio*, till the reign of Edward I. when the term *parliament* was first applied to the national council; and then the former was stiled *coram rege in parliamento*.

THE judicial authority of the barons, which still resided with them after the dissolution of the *curia regis*, was this: they were the court of last resort in all cases of error; they explained doubtful points of law, and interpreted their own acts; for which purpose the justices used commonly to refer to the great council matters of difficulty depending before them in the courts below. They heard causes commenced originally there, and made awards thereupon; and they tried criminal accusations brought against their own members.

THE *council*, properly so called, seems to have had a more ordinary and more comprehensive jurisdiction than the *commune concilium*; which it was enabled to exercise more frequently, as it might be, and was, continually summoned; while the other was called only on great emergencies. In the court held *coram rege in concilio*, there seems

ſeems to have reſided a certain ſupreme adminiſtration of juſtice, in reſpect of all matters which were not cognizable in the courts below: this juriſdiction was both civil and criminal. They entertained enquiries concerning property for which the ordinary courſe of common-law proceeding had provided no redreſs, and uſed to decide *ex æquo et bono*, upon principles of equity and general law. All offences of a very exorbitant kind were proper objects of their criminal animadverſion. If the perſons who had taken part in any public diſorder were of a rank or deſcription not to be made amenable to the uſual proceſs, or the occaſion called for ſomething more exemplary than the animadverſion which could be made by ordinary juſtices, theſe were reaſons for bringing enquiries before the council: in theſe, and ſome other inſtances, as well touching its civil as criminal juriſdiction, it acted only in concurrence with, and in aid of, the courts below.

THUS was the adminiſtration of juſtice ſtill kept, as it were, in the hands of the king; who, notwithſtanding the diſſolution of his great court, where he preſided, was ſtill, in conſtruction of law, ſuppoſed to be preſent in all thoſe which were derived out of it. The ſtile of the great council was *coram rege in concilio*, as was that of his ordinary council for advice. The chancery, when it afterwards became a court, was *coram rege in cancellariâ*, and the principal new court which had ſprung out of the *curia regis*, was *coram ipſo rege*, and *coram rege ubicunque fuerit in Angliâ*.

Of the ſpiritual court.

THE ſeparation of eccleſiaſtical cauſes from civil, was not the leaſt remarkable part of the revolution our laws underwent at the Conqueſt. The joint juriſdiction exerciſed in the Saxon times by the biſhop and ſheriff was diſſolved, as has been before mentioned, by an ordinance of William; and the biſhop was thenceforth to hold his court ſeparate from that of the ſheriff[y].

[y] Wilk. Leg. Sax. 292. Seld. Tithes, 413.

THIS

THIS ordinance of William is compriſed in a charter relating to the biſhopric of Lincoln; and therein he commanded, "that no biſhop or archdeacon ſhould thence-"forward hold plea *de legibus epiſcopalibus* in the hundred "court, nor ſubmit to the judgment of ſecular perſons any "cauſe which related to the cure of ſouls; but that who-"ever was proceeded againſt for any cauſe or offence ac-"cording to the epiſcopal law, ſhould reſort to ſome place "which the biſhop ſhould appoint, and there anſwer to "the charge, and do what was right [z] towards God and "the biſhop, not according to the law uſed in the hun-"dred, but according to the canons, and the epiſcopal "law." In ſupport of the biſhop's juriſdiction, it was moreover ordained, "that ſhould any one, after three no-"tices, refuſe to obey the proceſs of that court, and make "ſubmiſſion, he ſhould be excommunicated; and, if need "were, the aſſiſtance of the king or the ſheriff might be "called in. The king moreover ſtrictly charged and com-"manded, that no ſheriff, *præpoſitus ſive miniſter regis*, nor "any layman whatſoever ſhould intromit in any matter of "judicature that belonged to the biſhop [a]." This is the whole of that famous charter.

WHEN the ſpiritual court was once divided from the temporal, different principles and maxims began to prevail in that tribunal. The biſhop thought it no ways unſuitable, that ſubjects of a different nature from thoſe concerning which the temporal courts decided, ſhould be adjudged by different laws; and, being now out of the influence and immediate ſuperintendance of the temporal judges, he was very ſucceſsful in introducing, applying, and gaining preſcription for the favourite ſyſtem of pontifical law, to which every churchman, from education and habit, had a ſtrong par-

[z] *Facia: rectum.*

[a] Wilk. Leg. Ang. Sax. pa. 292, 293.

tiality.

tiality. The body of canon law soon exceeded the bounds which a concern for the government of the church would naturally affix to it. Instead of confining their regulations to sacred things, the canonists laid down rules for the ordering of all matters of a temporal nature, whether civil or criminal. The buying and selling of land, leasing, mortgaging, contracts, the descent of inheritance; the prosecution and punishment of murder, theft, receiving of thieves, frauds; these and many other objects of temporal judicature are provided for by the canon law; by which, and which alone, it was meant the clergy should be governed as a distinct people from the laity. This scheme of distinct government was, perhaps, not without some example in the practice of the primitive times; when it was recommended that christian men should accommodate differences among themselves, without bringing scandal on the church by exposing their quarrels to the view of temporal judges. For this purpose, bishops had their *episcoporum ecdici*, or *church-lawyers*; and, in after-times, their officials, or chancellors: and when the Empire had become christian, the like practice continued, for similar reasons, with regard to the clergy. But this, which was in its design nothing more than a sort of compact between the individuals of a fraternity, was exalted into a claim of distinct jurisdiction, exclusive of the temporal courts, for all persons who came under the title of clerks, and for many objects which were said to be of a spiritual nature. This attempt was favoured by the separation now made, in this country, between the spiritual and temporal judges.

In the gradual increase of this clerical judicature separate from the temporal courts, we see the means by which the ecclesiastics in after-times were enabled to perfect their scheme of independent sovereignty, in the midst of secular dominion; whereby they assumed powers dangerous to the crown, and the political freedom of the state.

The increase of the clergy in power and consequence was owing to the influence of the civil and canon law. With

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theſe inſtruments they ventured to encounter the eſtabliſhed authority of the municipal law, whoſe dictates were ſo oppoſite to their grand ſchemes of eccleſiaſtical ſovereignty.

SUCH an entire deſtruction had been made of every eſtabliſhment by the Saxon invaders, that the Roman law was quite eradicated. The only remains of this law that could be picked up in the Saxon times, were from the code of Theodoſius, and ſuch ſcraps of Gaius, Paulus, and Ulpian, as ſtill exiſted in ſome mutilated parts of the Pandects[b]. Theſe remnants of the civil law, like other learning, were moſtly in the hands of eccleſiaſtics, who ſtudied them with diligence. It was from theſe that they formed a ſtile, and learned a method, by which to frame their own conſtitutions; which were now growing to ſome magnitude and conſequence, and began to claim notice as a ſeparate ſyſtem of law of themſelves.

DURING the reigns of William the Conqueror and Rufus, we hear nothing in this country of the civil law[c]; though the inſtitute, the code, and the novels of Juſtinian, had been taught in the ſchool of *Irnerius*, at Bologna, and there were even ſome imperfect copies of the Pandects in France; yet the ſtudy of the civil law did not go on with ſpirit; nor was that ſyſtem of juriſprudence regarded with the univerſal reverence which it acquired afterwards, when a complete copy of the Pandects was found at Amalfi, A. D. 1137, at the time that city was taken by the Piſans[d].

THE canon law firſt known in this country was formed by permiſſion and under authority of the government, and ſeemed to be ſupported by arguments of expediency. The exiſtence of a church, with the gradation and ſubordination of governors and governed, called for a ſet of regulations for the direction and order of its various functions. This was admitted; and under that notion a body of canonical juriſprudence had been ſuffered to grow up for a long courſe

b Duck de aut. 299.
c Ibid. 307.
d Giann. Hiſt. Nap. lib. 11. ca. 2. vol. 2. p. 119.

of

of years. In a national ſynod held A. D. 670, the *codex canonum vetus eccleſiæ Romanæ* was received by the clergy[e]. It appears alſo by the before-mentioned charter to the biſhop of Lincoln, that[f] William the Conqueror, with the advice and aſſent of his great council, had reviewed and reformed the epiſcopal laws that were in uſe till his time in England. It is beyond diſpute that a canon law of ſome kind had been long eſtabliſhed here by the ſanction of the legiſlature; as may be ſeen in Mr. Lambard's Collection of Saxon Conſtitutions[g]. Theſe antient canons were probably not ſo prejudicial to the rights of the ſovereign and the ſtate; for which reaſon, as well as on account of the appearance they bore of municipal regulations, made at home for the government of the church, they had never excited any complaint or jealouſy.

But a compilation of canon law was made by *Ivo de Chartres*, in the time of Henry I. containing many extravagant opinions, calculated to advance the dominion of the pope, and the pretenſions of the clergy. After this, and about fourteen years after the diſcovery of the Pandects, in the year 1151, a more complete collection of canon law was made by *Gratian*, a Benedictine Monk of Bologna, and was publiſhed under the title of *Decretum*: it was made in imitation of the Pandects, and was a *digeſt* of the whole *pontifical* canon law. This is a collection of opinions and deciſions, extracted from ſayings of the fathers, canons of councils, and, above all, from decretal epiſtles of popes; all tending to exalt the clerical ſtate, and to exempt the clergy from ſecular ſubordination. The applauſe this book received from the ſee of Rome and the clergy, raiſed it ſoon above all former collections; and it became the grand code of eccleſiaſtical law, upon which the popiſh hierarchy reſted all its hopes and pretenſions.

[e] Seld. Notes to Eadm.
[f] Wilk. Leg. Ang. Sax. p. 292.
[g] Duck de aut. 98.

THE canon and civil law had before been ſtudied and profeſſed by the ſame perſons; and the union of theſe two laws was now drawn cloſer. The canon law was from the beginning under great obligations to the civil; the very form in which it now appeared was evidently borrowed from thence; and whatever was moſt excellent in it, was acknowledged to be copied from that model. Theſe two ſyſtems now became ſo connected, and in ſo near a degree of relation, that a learned writer ſays, the one could not ſubſiſt without the other. They afforded each other a mutual ſupport; they had the ſame profeſſors; and it was requiſite to the fame and preferment of a churchman, that he ſhould be both a civilian and a canoniſt.

WHEN theſe two laws were brought into this high repute, *Vacarius* came into England, and, A. D. 1149, towards the end of Stephen's reign began to read lectures, at Oxford, on the canon and civil law. Upon this an alarm was raiſed, and the king, apprehenſive of the conſequences to which theſe new doctrines might lead, in the year 1152, or thereabouts, is ſaid to have forbid the reading of books of the canon law[h]; a prohibition that could not be meant to extend to that canon law which had long been admitted and ratified, but probably only to the novel and bold opinions contained in the collection of *Ivo de Chartres*, and more particularly in that lately made by *Gratian*.

INDEED the uſe of the canon law became now a ſubject of very ſerious conſideration. The canons before admitted here were very antient; many of them had received a legiſlative ſanction, and by long continuance they had ingrafted themſelves into the conſtitution of the country; but a ſet of opinions entirely new was advanced by the publication of the *Decretum*, which, from the parade of the work and the ſupport it received from the ſee of Rome, had the appearance of a promulgation of laws impoſed on the chriſ-

[h] Joh. Saliſb. de nug. curiæ.

tian

tian world by the ſole and ſupreme authority of the pope. From a queſtion on the *utility*, as it had been before in ſome reſpects, it became now a queſtion upon the *authority* of theſe laws[1]. The conteſt between the ſecular and eccleſiaſtical ſtate was thenceforward more violent, as the points upon which it aroſe were more important.

NOTWITHSTANDING the prohibition of king Stephen, the ſtudy of the civil and canon law was univerſally promoted by the clergy. Educated in opinions calculated to promote the benefit and emolument of their own order, it was not much to be wondered, that they ſtruck in with the deſigns of the pope, and ſtood firmly upon the maintenance of their own pretended rights and privileges.

THE active ſpirit of the clergy did not want inſtruments to work with: the body of canon law lately publiſhed by *Gratian* furniſhed authority and arguments for every ſpecies of uſurpation.

Doctrines of the canon law.

THE doctrines of the canon law, as delivered in the *Decretum*, tended to mark more ſtrongly the diſtinction between clergy and laity, and the great deference due to the former. It is there laid down, that a cuſtom againſt the decree of a pope is void; and that all men muſt obſerve the pope's command. It is made an anathema to ſue a clergyman before a lay judge; if a lay judge condemn or deſtroy a clerk, he is to be excommunicated; a clerk may implead a layman before what judge he pleaſes; judges who compel a clerk to anſwer to a ſuit before them, ſhall be excommunicated; a layman cannot give evidence againſt a clerk; with numberleſs extravagancies of the ſame kind. Such notions did the canoniſts propagate for law reſpecting churchmen, in the reigns of Henry II. of Richard, and of John.

INDEED it was not till theſe doctrines had generally prevailed, that the ſeparate eſtabliſhment of eccleſiaſtical judicature gained much ſtrength. It was not till the publi-

[1] Litt. Hen. II. vol. 2. 471.

cation

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cation of the *Decretum*, and the growing authority of the canons had given ſome order, conſiſtence, and ſtability to ſpiritual government, that the excluſive juriſdiction of theſe courts was an object of very important conſideration, or that their claims were urged to any great extent.

SOME cauſes, apparently clerical, had continued to hang about the temporal courts, particularly thoſe concerning tithes; which, being the iſſues of freehold property, and ſo partaking of its nature, could hardly be conſidered as merely ſpiritual[k]. Accordingly ſuch pleas were held both in the eccleſiaſtical and temporal courts till the time of Henry II. After that, tithes came under the notice of our courts of common law only in an indirect proceeding; ſuch as on prohibitions, writs of right of advowſon, or by *ſcire facias*[l], an antient proceeding ſince aboliſhed by parliament[m]. The prerogatives of the hierarchy, and the juriſdiction of the eccleſiaſtical courts aſſiſted each other in extending their influence. The courts grew in authority, and the biſhops roſe in their pretenſions.

AMONGST other attempts to aggrandiſe themſelves, the clergy did not omit ſo valuable a ſubject of acquiſition as benefices. A benefice, being an eleemoſynary proviſion for a perſon who officiated in the diſcharge of religious duties, was originally in the ſole diſpoſal of the founder, and was conferred, like other donations, by inveſtiture; but the biſhops, as having the ſuperintendence over ſpiritual things, claimed a right of controul over theſe gifts. This occaſioned a conteſt between patrons and the biſhops for many years; till at length the antient way of inveſtiture intirely ceaſed about the reigns of king Richard and John, and lay-patrons became obliged firſt to preſent their clerks to the biſhop, who, according to his diſcretion, gave them *inſtitution*[n]. A like method of filling vacant biſhopricks was claimed by the pope; but the ſpirited reſiſtance of ſome

[k] Selden's Tithes, 387.
[l] Ibid. 422.
[m] By ſtat. Ed. III.
[n] Selden's Tithes, 383.

of

of our kings defeated all his attempts; though, as usual, he never receded from the pretended right.

THE appointment, however, to bishopricks was, to a degree, put under the controul of the pope. In the time of Henry I. a bishop elect was to receive *investiture* of his temporalties from the king, of whom all bishops held their lands as baronies. This was performed by the king's delivering to the bishop a ring and crosier, as symbols of his spiritual marriage to the church and of his pastoral office; and hence called investiture *per annulum et baculum*; after this the bishop used to do *homage* to the king, as to his liege lord. But that king finding it expedient to give way to the demands of the pope, resigned this power and ceremony of investiture, and only required that bishops should do homage for their temporalties: and king John, to obtain the protection of the pope, was contented to give up, by charter, to all monasteries and cathedrals, the free right of electing their prelates, whether abbots or bishops. He reserved only to the crown the custody of the temporalties during the vacancy; the form of granting a licence to proceed to election (since called a *congé d'élire*), on refusal whereof the electors might make their election without it; and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause. This grant was expressly recognised and confirmed by king John's *Magna Charta;* was again established by stat. 25. Ed. III. st. 6. c. 3.; and continued the law and practice till the time of Henry VIII.

To return to the progress of ecclesiastical judicature. There were two subjects of jurisdiction which the spiritual court gradually drew to itself and endeavoured to appropriate: these were *marriages* and *wills*; which latter led to the cognizance of *legacies*, and the disposal of *intestates' effects*.

MARRIAGE, being a contract dictated and sanctioned by the law of nature, and entitling the parties to certain civil rights, seems to have nothing in it of spiritual cognizance;

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nizance; but the church of Rome having converted it into a ſacrament, it became entirely a ſpiritual contract, and as ſuch fell naturally within the eccleſiaſtical juriſdiction, very ſoon after its ſeparation from the ſecular court; it followed almoſt of conſequence, that the ſpiritual court ſhould likewiſe determine queſtions of *legitimacy* and *baſtardy*.

Probate of wills.

CASES of wills and inteſtacy, as they were, in their nature, leſs allied to the ſpiritual function, did not entirely ſubmit to the eccleſiaſtical juriſdiction. It appears from Glanville, that in the reign of Henry II. the juriſdiction of perſonal legacies was in the temporal courts[o]. But notwithſtanding this, if there was a queſtion in the temporal court, whether a teſtament was a true one or not; whether it was duly made, or whether the thing demanded was really bequeathed; ſuch plea was to be heard and determined by the court chriſtian; becauſe, ſays our author, *all pleas upon teſtaments are properly cognizable before the eccleſiaſtical judge* [p]. Thus the validity of a teſtament, or the bequeſt of a legacy, was to be certified by the ſpiritual court: nevertheleſs, as in caſes of *baſtardy* the court chriſtian did nothing more than anſwer the mere queſtion, whether baſtard or not, and the conſequence of *deſcent* and title was left to be determined at common law; ſo were the conſequences of a teſtament, as the recovery and payment of legacies, to be heard and determined in the temporal courts.

BY the manner in which Glanville ſpeaks of the *probate* of wills, it ſeems as if that courſe of authenticating wills had been long in uſe. The beginning, or ſteps, by which this innovation eſtabliſhed itſelf, it is not eaſy to trace: it lies buried in that obſcurity which involves not only the origin of our municipal cuſtoms, but the incroachments gradually made upon them by the civil and canon law.

WHEN the eccleſiaſtical court had once the probate of wills, it appeared no very great enlargement of juriſdiction

[o] Lib. 7. c. 6, 7. [p] Ibid.

to

to add the power of enforcing the execution of them, in payment of legacies. But there are no teſtimonies of thoſe times that warrant us to conclude, that this had generally obtained before the reign of Henry III. [q].

It ſeems doubtful, whether the mode uſed by the Saxons for the diſtribution of the eſtates of *inteſtates* continued during the whole of this period. A law of Henry I. ſays, that upon a perſon dying inteſtate, thoſe who were intitled to ſucceed ſhould divide his effects *pro animâ ejus*. This is the firſt mention in our law of a diſpoſition of an inteſtate's effects for the benefit of his ſoul; but there is no mention of the controul or intermeddling of the biſhop, either in this law, or, even later than this, in Glanville; although he expreſsly mentions the juriſdiction of the church as to teſtaments.

In king John's charter it was expreſsly provided, that if any freeman died inteſtate, his chattels ſhould be diſpoſed of by the hands of his next of kin, *per viſum eccleſiæ*, by the advice and direction of the ordinary, ſaving to all creditors their debts. This clauſe, it is ſaid, was word for word in the charter 9 Hen. III. and is to be ſeen in ſeveral manuſcripts of it [r]; but being left out of the exemplification of this charter on the roll 25 Ed. I. from which is copied the *Magna Charta* in our ſtatute books, it is not now found there. This proviſion was probably inſerted by the contrivance of the biſhops, who, with Pandolfo the pope's nuncio, were with John at Runnymede. There was not wanting colour for a proviſion like this; for as the ſtatute of Henry I. before alluded to, had expreſsly ſaid, that the diſtribution was to be *pro animâ inteſtati*, the biſhops ſeemed, by their holy function, to be beſt qualified to ſee this office performed with fidelity. Hence it was, that, in after-times, this power was delegated by the ordinary to the next of kin, in letters or otherwiſe; an autho-

[q] Seld. Works, vol. 3. 1672. [r] Ibid 1676.

rity

rity grounded upon theſe words of the charter, *per viſum eccleſiæ*[a]; though there are no documents that aſſure us this law was put in force during the reign of king John.

In the reign of Stephen the clergy began to draw into the ſpiritual court the trial of perſons *pro læſione fidei*, that is, for breach of faith in civil contracts. By means of this they took cognizance of many matters of contract which belonged properly to the temporal court. This was the boldeſt ſtretch which that tribunal ever made to extend its authority, and would, in time, have drawn within its juriſdiction moſt of the tranſactions of mankind. The pretence on which they founded this claim was probably this: that oaths and faith ſolemnly plighted being of a religious nature, the breach of them more properly belonged to the ſpiritual than to the lay tribunal.

The circumſtances of the times tended very much to encourage the clergy in their ſcheme of oppoſition to the ſecular power. The proviſion for the clergy was in thoſe days very precarious, and left them at the mercy of their patrons. Being, in general, from their function, conſidered as a ſacred body of people, when oppreſſed and ill-treated by potent lords, they drew the compaſſion of many, and particularly the ſupport of their biſhops; who, in their turn, receiving as little favour from kings, were continually increaſing their ſtore of merit with the ſovereign pontiff by the many ſtruggles they engaged in on their own account, and on account of their inferior brethren. The pope, no ungrateful ſovereign, always diſtinguiſhed his zeal in ſupporting his biſhops, as they did in ſupporting the lower clergy; till the ſeveral orders of eccleſiaſtics, united in a common cauſe, and ſharpened againſt the laity by long contention, encouraged each other, by every motive of defence and aggrandiſement, to contribute in their ſtations to promote the power of the church. The pope having made

[a] Seld. Works, vol. 3. 1679.

uſe

uſe of the biſhops to gain and govern the clergy, united all their powers to eſtabliſh a dominion over the laity; and no occaſion was let paſs in which any of them could ſnatch an advantage.

HENRY I. being ſeated on the throne by a doubtful title, thought it prudent to gain the clerical part of his ſubjects by ſome conceſſions. Stephen, who owed his authority entirely to them, went further. By theſe means they acquired ſuch confirmed ſtrength and habitual reverence from the people, that, notwithſtanding all the power of Henry II. and the ſpirit with which he aſſerted his ſovereignty and independence, the conteſt he had with Becket tended to an iſſue directly contrary to that which he had promiſed himſelf; ſo that, after ſome conceſſions and connivance, to which he ſubmitted in fits of repentance, his reign ended in a firm eſtabliſhment of the clergy in moſt of their extraordinary claims of privilege and juriſdiction.

THE conteſt that Henry II. had with Becket concerning the limits of eccleſiaſtical power, fills up a great part of that king's reign. To give weight to his ſide of the conteſt, and, inſtead of debating, to effect a clear deciſion, Henry procured an act of the legiſlature formally enacting the principal points of controverſy for which he contended. This was the famous *Conſtitutions of Clarendon*.

Conſtitutions of Clarendon.

AT a great council held at Clarendon, A. D. 1164, in the 10th year of his reign, a code of laws was brought forward by the king, under the title of *the ancient cuſtoms of the realm*; and as Becket had ſolemnly promiſed he would obſerve what were really ſuch, the king procured the principal propoſitions in diſpute to be enacted, and declared by the council under that denomination. Nothing will enable us to judge ſo well of the pretenſions of the clergy, as a peruſal of theſe Conſtitutions; they ſhall therefore be ſtated at length. They are contained in ſixteen articles; ten of which were conſidered by the ſee of Rome as ſo hoſtile to the rights of the clergy, that pope Alexander in full conſiſtory paſſed

paſſed a ſolemn condemnation on them; the other ſix he *tolerated, not as good, but leſs evil.* Theſe ſix articles were the 2d, 6th, 11th, 13th, 14th, and 16th.

THE 2d, Churches belonging to the ſee of our lord the king cannot be given away in perpetuity, without the conſent and grant of the king. 6th, Laymen ought not to be accuſed, unleſs by certain and legal accuſors and witneſſes, in preſence of the biſhop, ſo as that the archdeacon may not loſe his right, nor any thing which ſhould thereby accrue to him; and if the offending perſons be ſuch as none will or dare accuſe them, the ſheriff, being thereto required by the biſhop, ſhall ſwear twelve lawful men of the vicinage or town before the biſhop, to declare the truth according to their conſcience. 11th, Archbiſhops, biſhops, and all dignified clergymen [1], who hold of the king in chief, have their poſſeſſions from the king as a barony, and anſwer thereupon to the king's juſtices and officers, and follow and perform all royal cuſtoms and rights, and, like other barons, ought to be preſent at the trials of the king's court, with the barons, till the judgment proceeds to loſs of members, or death. 13th, If any nobleman of the realm ſhall forcibly reſiſt the archbiſhop, biſhop, or archdeacon, in doing juſtice upon him or his, the king ought to bring them to juſtice; and if any ſhall forcibly reſiſt the king in his judicature, the archbiſhops, biſhops, and archdeacons, ought to bring him to juſtice, that he may make ſatisfaction to our lord the king. 14th, The chattels of thoſe who are under forfeiture to the king, ought not to be detained in any church or church-yard againſt the king's juſtice, becauſe they belong to the king, whether they are found within churches, or without. 16th, The ſons of villains ought not to be ordained without the conſent of their lord, in whoſe lands they are known to have been born.

THUS was the pope pleaſed to tolerate ſuch of theſe articles as either did not at all affect the clerical ſtate, or rather

[1] So *univerſæ perſonæ* is conſtrued by Lord Littelton in his Hen. II. vol. 4. 370.

contributed

contributed to aid and ſupport it; and were thrown in, probably, to qualify and temper thoſe which were evidently hoſtile to the eccleſiaſtical ſovereignty. The ten which were condemned by the pope, were as follow.

THE 1ſt, If any diſpute ſhall ariſe concerning the advowſon and preſentation of churches between laymen, or between eccleſiaſtics and laymen, or between eccleſiaſtics, let it be tried and determined in the court of our lord the king. 3d, Eccleſiaſtics charged and accuſed of any matter, and being ſummoned by the king's juſtice, ſhall come into his court to anſwer there concerning that which it ſhall appear to the king's court is cognizable there; and ſhall anſwer in the eccleſiaſtical court concerning that which it ſhall appear is cognizable there; ſo that the king's juſtice ſhall ſend to the court of holy church, to ſee in what manner the cauſe ſhall be tried there; and if an eccleſiaſtic ſhall be convicted, or confeſs his crime, the church ought not any longer to give him protection. 4th, It is unlawful for archbiſhops, biſhops, or any dignified clergymen of the realm, to go out of the realm without the king's licence; and if they go, they ſhall, if it ſo pleaſe the king, give ſecurity that they will not, either in going, ſtaying, or returning, procure any evil or damage to the king, or kingdom. 5th, Perſons excommunicated ought not to give any ſecurity by way of depoſit, nor take any oath, but only find gage and pledge to ſtand to the judgment of the church, in order to abſolution. 7th, No tenant *in capite* of the king, nor any of the officers of his houſhold, or of his demeſne, ſhall be excommunicated; nor ſhall the lands of any of them be put under an interdict, unleſs application ſhall firſt have been made to our lord the king, if he be in the kingdom, and if not, to his juſtice, that he may do right concerning ſuch perſon; and in ſuch manner, as that which ſhall belong to the king's court ſhall be there determined, and what ſhall belong to the eccleſiaſtical court ſhall be ſent thither to be there determined. 8th, Concerning appeals,

peals, if any shall arise, they ought to proceed from the archdeacon to the bishop, and from the bishop to the archbishop: and if the archbishop shall fail in doing justice, the cause shall at last be brought to our lord the king, that, by his precept, the dispute may be determined in the archbishop's court; so that it ought not to proceed any further without the king's consent. 9th, If there shall arise any dispute between an ecclesiastic and a layman, or between a layman and an ecclesiastic, about any tenement which the ecclesiastic pretends to hold *in eleemosynâ*, and the layman pretends to be a lay fee, it shall be determined by the judgment of the king's chief justice, upon a recognition of twelve lawful men, *utrùm tenementum sit pertinens ad eleemosynum, sive ad fœdum laicum.* And if it be found to be *in eleemosynâ*, then it shall be pleaded in the ecclesiastical court; but if a lay fee, then in the king's court, unless both parties claim to hold of the same bishop or baron: and if they do, then the plea shall be in his court; provided, that by such recognition, the party who was first seised shall not lose his seisin till the plea has been finally determined. 10th, Whosoever is of any city, or castle, or borough, or demesne manor of our lord the king, if he shall be cited by the archdeacon or bishop for any offence, and shall refuse to answer to such citation, may be put under an interdict; but he ought not to be excommunicated till the king's chief officer of the town be applied to, that he may, by due course of law, compel him to answer accordingly; and if the king's officer shall fail therein, such officer shall be *in misericordiâ regis*; and then the bishop may compel the person accused by ecclesiastical justice. 12th, Pleas of debt, *quæ fide interpositâ debentur, vel absque interpositione fidei*, whether due by faith solemnly pledged, or without faith so pledged, belong to the king's judicature. 15th, When an archbishopric, or bishopric, or abbey, or priory of royal foundation, shall be vacant, it ought to be in the hands of the king, and he shall receive

ceive all the rents and iſſues thereof, as of his demeſne. And when ſuch church is to be filled, the king ought to ſend for the principal clergy thereof, and the election ought to be made in the king's chapel, with the king's aſſent, and the advice of ſuch of the prelates of the kingdom as he ſhall call for that purpoſe [u]; and the perſon elect ſhall there do homage and fealty to the king as his liege lord, of life, limb, and worldly honour (ſaving his order), before he be conſecrated [x].

THESE Conſtitutions were calculated to give a rational limitation to the ſecular and eccleſiaſtical judicature; and furniſhed a baſis on which theſe ſeparate juriſdictions might have been founded, without any inconvenience to the nation, or diminution of the temporal authority; and they were with that view confirmed, A. D. 1176, at a council held at Northampton. But the king, overcome with ſhame for the murder of Becket, with which he was charged, and ſtruck with a panic of ſuperſtition, gave way to the torrent, and endeavoured to reconcile himſelf to the holy ſee by an ample concurrence with all its demands; at leaſt he deſiſted from executing thoſe laws for which he had ſo many years been contending. It appears, moreover, from a letter which he ſent to the pope by the hand of *Hugo Petrileo*, the legate, that, *notwithſtanding the oppoſition of the greateſt and wiſeſt men in his kingdom*, he had, at the interceſſion of the legate, and out of reverence and devotion to the ſee of Rome, made the following conceſſions: That no clerk ſhould, for the future, be brought perſonally before a ſecular judge for any crime or tranſgreſſion [y] whatſoever, except only for offences againſt the foreſt laws, or in caſe of

[u] *Debet fieri electio aſſenſu domini regis, et conſilio perſonarum regni quas ad hoc faciendum vocaverit.*

[x] Vid. Wilk. Ang. Sax. Leg. p. 321. and alſo in Litt. Hen. II. vol. 4. 414. a copy of theſe Conſtitutions from the Cottonian manuſcript of Becket's Life and Epiſtles, which is probably the moſt ancient and correct copy of them.

[y] *De aliquo foris-facto.*

a lay

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a lay fee for which lay ſervice was due to the king, or to ſome other ſecular perſon. He promiſed, that any perſon convicted, or making confeſſion before his juſtice, in the preſence of the biſhop, or his official, of having knowingly and premeditatedly killed a clerk, ſhould, beſides the uſual puniſhment for killing a layman, forfeit all his land of inheritance for ever [a]. He alſo promiſed, that clerks ſhould not be compelled to ſubmit to the trial by duel; and moreover, he promiſed not to retain in his hands vacant biſhoprics or abbeys beyond the term of one year, unleſs from urgent neceſſity, and evident cauſe of delay, not falſely pretended [a]. It is ſaid [b], that Henry, by charter, granted to the clergy the cognizance of cauſes matrimonial; but neither this nor any other of the foregoing conceſſions were enacted by authority of parliament, during any part of this king's reign; nor did he himſelf obſerve them, except in not compelling criminal clerks to appear before a lay judge, as before ſtipulated, and in exempting them in all caſes from the trial by duel. The ſtatutes of Clarendon concerning eccleſiaſtical matters ſubſiſted unrepealed and confirmed; but were ſuſpended in part by a temporal connivance of the executive power [c].

THE eſtabliſhment which the clergy gained in this reign was not weakened in thoſe of his ſucceſſors. Richard I. was redeemed from his captivity by the aid of his ſubjects; among whom the zeal of the eccleſiaſtics, who readily converted their plate and other valuables to the ranſom of their king, was particularly diſtinguiſhed. This gave them every thing to hope from the king's gratitude; nor were they diſappointed in their expectations. The feudal ſubjection under which John laid his kingdom to the pope,

[a] What extraordinary penalty was this, when laymen, at that time, forfeited their lands in caſes of felony?

[a] Wilk. Leg. Ang. Sax. p. 331. Litt. Hiſt. Hen. II. vol. 4. 265. 296.

[b] Sir Roger Owen MSS. p. 397.

[c] Sir Roger Owen ſays, the king obtained a parliamentary repeal of the Conſtitutions of Clarendon. MSS. p. 404.

ratified

ratified every clerical innovation, and seemed to justify the distinctions before claimed by the churchmen.

In this manner did the influence of the civil and canon law gradually increase; but these laws were not confined to the ecclesiastical courts, where they were professedly the only rules of decision: they, by degrees, interwove themselves into the municipal law, and furnished it with helps towards improving its native stock. The law of personal property was in a great measure borrowed from the imperial, and the rules of the descent of lands wholly from the canon law: to these might be added many other instances of imitation, too long to be enumerated in the present work.

These two laws, as the Norman had before, obtained here by sufferance and long usage. Such parts of them as were fitting and expedient, were quietly permitted to grow into practice; while such as were of an extravagant kind occasioned clamour, were called usurpations, and, as such, were strongly opposed. What was suffered to establish itself, either in the clerical courts, or by mingling with the secular customs, became so far part of the common law of the realm, equally with the Norman; for though of later birth, it had gained its authority by the same title, a length of immemorial prescription [d].

It

[d] This is all that I thought necessary to state concerning the prevalence of the civil and canon law, and the influence they both had upon the common custom of the realm; and I have heard no complaint, as in the case of feuds, that this part of the work is at all defective: indeed, I should not wonder, if some thought even this short sketch too prolix; so much are our studies and opinions directed by fashion. But it seems to me, if the illustration of our ancient law had been the sole object of attention, and not a prepossession in favour of a topic that happened to be in vogue, that the same censure would be at least as applicable in one as in the other case.

A comparison of our law with those two systems of jurisprudence, would, in my mind, be an enquiry of equal curiosity, and much more to the purpose of a history of the English law, than the same process when applied to the so-much-admired systems of foreign feuds. This is sufficiently evinced by the cursory remarks already made respecting these two laws. It further appears by the works of Glanville, Bracton, and other old authors, who certainly wrote the law of their time, and not their own inventions, as has been too often

Of trial by duel in civil queſtions.

IT had been a very ancient cuſtom among the Normans, both in their own country and in France, to try titles to land, and other queſtions, by *duel*. When William had ordained that this martial practice of his own country ſhould be obſerved here in criminal trials, it became very eaſy to introduce it into civil ones; and being only uſed in the *curia regis*, it had not, among the other novelties of that court, as it certainly would have had in the county court, or any other of the ancient tribunals of Saxon original, the appearance of ſo ſingular an innovation.

WITH all its abſurdity, this mode of trial was not without ſome marks of a rational reliance on teſtimony, and vouchers for the truth of what was in diſpute; for it was never awarded without the oath of a credible witneſs, who would venture his life in the duel for the truth of what he ſwore. "I am ready," ſays the party litigant, "to prove it by my freeman John, whom his father on "his death-bed enjoined, by the duty he owed him, that

often and too inconſiderately ſaid; and it is confirmed by marks of conformity or imitation, in inſtances where no ſuſpicion of fabrication was ever entertained.

The civil and canon law ſeem in a particular manner to be objects of curioſity to an Engliſh lawyer; they have long been domeſticated in this country; were taught at our univerſities as a part of a learned education, and the road to academic honours; they have entered into competition with the common law; and, though unſucceſsful in the ſtruggle, were ſtill thought worthy to be retained in our eccleſiaſtical courts, and there became the model by which our national canons and provincial conſtitutions were framed. Theſe two laws, therefore, ſtand in a much nearer relation to the common law, than the feudal law of Lombardy, or of any foreign country; none of which can boaſt any pretenſions equal to thoſe abovementioned.

Notwithſtanding this cloſe affinity between the civil and canon law and our own, I thought, that to enter into a particular compariſon of ſuch parts of thoſe laws as ſeemed more remarkably to relate to the common law, was an enquiry not ſtrictly within the compaſs of the preſent Hiſtory; and therefore I declined it, for reaſons ſimilar to thoſe I have before given with regard to foreign feuds.

I cannot, however, leave this ſubject without expreſſing a wiſh, that the early connexion of our law with the civil and canon law was more fully inveſtigated than it has yet been. The hiſtory and preſent ſtate of thoſe two laws in this country, and of our own national canon law, ſeems alſo to have been not yet ſufficiently developed. To this it may be anſwered, that there is at leaſt as great want of curioſity upon this topic, as of information; and I am ſure I do not pretend to determine which of theſe is the cauſe, and which the effect, of the other.

"if

"if at any time he should hear of a suit for this land, he "should hazard himself in a *duel* for it, as for that which his "father had *seen and heard*[e]." Thus the champion of the demandant was such a one as might be a fit witness; and on that account the demandant could never engage in the combat himself: but the other party, who was defendant, or tenant, in the suit, might engage either in his own person, or by that of another.

It is difficult to say what matters were, at one time, submitted to this mode of trial. Perhaps at first all questions of fact might, at the option of the demandant, have been tried by duel. In the reign of Henry II. it was decisive in pleas concerning freehold; in writs of right; in warranty of land, or of goods sold; debts upon mortgage or promise; sureties denying their suretyship; the validity of charters; the manumission of a villain; questions concerning services: all these might have been tried by duel[f].

Notwithstanding the general bent of this people to admit the propriety of a trial so suitable to their martial genius, there must have been men of gravity and learning amongst them at all times; and persons of that character would always reprobate so ineffectual and cruel a proceeding. Considerations of this kind at last effected a change.

We find in the reign of Henry II. that many questions of fact relating to property were tried by twelve *liberos et legales homines juratos, sworn* to speak the truth; who were summoned by the sheriff for that purpose. This tribunal was, in some cases, called *assisa*, from *assidere*, as it is said, because they sat together; though it is most probable, and indeed seems intimated by the manner in which Glanville often expresses himself, that it was emphatically so called

Of trial by jury.

[e] Ariosto, in the true spirit of the old jurisprudence, as well as of chivalry, makes Rinaldo refer to the trial of arms, as equal to if not *stronger* than that by testimony.

*Col testimonio, io vo', che l'arme sieno:*
*Che era, e in ogni tempo, che ti piace,*
*Te n' abbiano a far prova piu verace.*
Orl. Fur. cant. 31. stanz. 102.

[f] Glanv. passim.

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from the *aſſiſa* (as laws were then termed), by which the application of this trial was, in many inſtances, ordained. On other occaſions this trial was called *jurata*, from the *juratos*, or *juratores*, who compoſed it. Of the origin of this trial by twelve jurors, and the introduction of it into this country, we ſhall next enquire.

THE trial *per duodecim juratos*, called *nambda*, had obtained among the *Scandinavians* at a very early period; but having gone into diſuſe, was revived, and more firmly eſtabliſhed, by a law of *Reignerus*, ſurnamed *Lodbrog*, about the year A. D. 820[g]. It was about ſeventy years after this law, that *Rollo* led his people into *Normandy*, and, among other cuſtoms, carried with him this method of trial; it was uſed there in all cauſes that were of ſmall importance. When the Normans had tranſplanted themſelves into England, they were deſirous of legitimating this, as they did other parts of their juriſprudence; and they endeavoured to ſubſtitute it in the place of the Saxon *ſectatores*, to which tribunal it bore ſome ſhew of affinity.

THE earlieſt mention we find of any thing like a *jury*, was in the reign of William the Conqueror, in a cauſe upon a queſtion of land, where *Gundulph*, biſhop of *Rocheſter*, was a party. The king had referred it to the county, that is, to the *ſectatores*, to determine in their county court, as the courſe then was, according to the Saxon eſtabliſhment; and the *ſectatores* gave their opinion of the matter. But *Odo*, biſhop of *Bayeux*, who preſided at the hearing of the cauſe, not ſatisfied with their determination, directed, that if they were ſtill confident that they ſpoke truth, and perſiſted in the ſame opinion, they ſhould chuſe *twelve* from among themſelves, who ſhould confirm it upon their *oaths*[h]. It ſeems as if the biſhop had here taken a ſtep which was not in the uſual way of proceeding, but which he ventured upon in conformity with the practice of his own country; the general

[g] Hick. Theſ. Diſſ. Epiſt. 38, 39, 40. [h] Text. Roff. apud Hickes, ut ſup.

law

law of England being, that a judicial enquiry concerning a fact ſhould be collected *per omnes comitatûs probos homines*. Thus it appears, that in a cauſe where this ſame *Odo* was one party, and archbiſhop *Lanfranc* the other, the king directed TOTUM *comitatum conſidere*; that all men of the county, as well French as Engliſh, (particularly the latter) that were learned in the law and cuſtom of the realm, ſhould be convened: upon which they all met at *Pinendena*, and there it was determined AB OMNIBUS *illis probis*, and agreed and adjudged *à toto comitatu*. In the reign of William Rufus, in a cauſe between the monaſtery of *Croyland* and *Evan Talbois*, in the county court, there is no mention of a jury; and ſo late as the reign of *Stephen*, in a cauſe between the monks of Chriſt-Church, Canterbury, and *Radulph Picot*, it appears from the acts of the court [k], that it was determined *per judicium* TOTIUS COMITATUS [l].

THIS trial by an indefinite number of *ſectatores* or *ſuitors* of court continued for many years after the Conqueſt: theſe are the perſons meant by the terms *pares curiæ*, and *judicium parium*, ſo often found in writings of this period. Succeſſive attempts gradually introduced jurors to the excluſion of the *ſectatores*; and a variety of practice, no doubt, prevailed till the Norman law was thoroughly eſtabliſhed *. It was not till the reign of Henry II. that the trial by jurors became general; and by that time, the king's itinerant courts, in which there were no *pares curiæ*, had attracted ſo many of the country cauſes, that the *ſectatores* were rarely called into action †.

THE ſudden progreſs then made in bringing this trial into common uſe, muſt be attributed to the law enacted by that king. As this law has not come down to us, we are ignorant at what part of his reign it was paſſed, and what was the preciſe extent of its regulation: we can only col-

Of trial by the aſſiſe.

[k] Bib Cott. Fauſtinn. A. 3. 11. 31.

[l] Hickes Theſ. Diſſ. Ep. 36.

* The following law of Hen. I. ſeems to be in ſupport of the ancient uſage. *Unusquiſq*, PER PARES SUOS *judicandus eſt, et ejuidem provinciæ*; PEREGRINA *vero judicia mdis omnibus ſubmovemus*. Leg. 31.

† Perſons of a new character, under the name of *ſecta* and *ſectatores*, in a ſubſequent period, made a neceſſary part of moſt actions brought in the king's courts, as will be ſeen hereafter.

left

lect such intimation as is given us by cotemporary authorities, the chief of which is Glanville, who makes frequent allusions to it. It is called by him *assisa*, as all laws then were, and *regalis constitutio*; at other times, *regale quoddam beneficium, clementiâ principis de concilio procerum populis indultum.* It seems as if this law ordained, that all questions of *seisin* of land should be tried by a recognition of twelve good and lawful men, sworn to speak the truth; and also that in questions *of right* to land, the tenant might elect to have the matter tried by twelve good and lawful knights instead of the duel. It appears that some incidental points in a cause, that were neither questions of mere *right*, nor of *seisin* of land, were tried by a recognition of twelve men; and we find that in all these cases, the proceeding was called *per assisam*, and *per recognitionem*; and the persons composing it were called *juratores*, *jurati*, *recognitores assisæ*; and collectively *assisa*, and *recognitio*: only the twelve jurors in questions of right were distinguished with the appellation of *magna assisa*; probably because they were *knights*, and were brought together also with more ceremony, being not summoned immediately by the sheriff, as the others were, but elected by four knights, who for that purpose had been before summoned by the sheriff. We are also told, that the law by which these proceedings were directed, had ordained a very heavy penalty on *jurors* who were convicted of having sworn falsely in any of the above instances [1].

THUS far of one species of this trial by twelve men, which was called *assisa*. It likewise appears, that the oath of twelve jurors was resorted to in other instances than those provided for by this famous law of Henry II. and then this proceeding was said to be *per juratam patriæ, or vicineti, per inquisitionem, per juramentum legalium hominum.* This proceeding by jury was no other than that which we before mentioned to have gained ground by usage and custom. This was sometimes used in questions of property; but, it should seem, more frequently in matters of a criminal nature.

[1] Glan. lib. 13. c. 1. lib. 2. c. 7. 19.

THE

THE earliest mention of a trial by jury, that bears a near resemblance to that which this proceeding became in after-times, is in the Constitutions of Clarendon before spoken of. It is there directed, that, should nobody appear to accuse an offender before the archdeacon, then the sheriff, at the request of the bishop, *faciet jurare duodecim legales homines de vicineto, seu de villâ, quòd inde veritatem secundum conscientiam suam manifestabunt*[m]. The first notice of any *recognition*, or *assise*, is likewise in these Constitutions; where it is directed, that, should a question arise, whether land was lay or ecclesiastical property, *recognitione duodecim legalium hominum per capitalis justitiæ considerationem terminabitur, utrùm, &c.*[n]; this was A. D. 1164. Again, in the statute of Northampton, A. D. 1176, (which is said to be a republication of some statutes made at Clarendon, perhaps at the same time the before-mentioned provisions were made about ecclesiastical matters) the justices are directed, in case a lord should deny to the heir the seisin of his deceased ancestor, *faciant inde fieri recognitionem per duodecim legales homines, qualem seisinam defunctus inde habuit die quâ fuit vivus et mortuus;* and also *faciant fieri recognitionem de disseisinis factis super assisam, tempore quo* the king came into England, after the peace made between him and his son. We see here, very plainly described, three of the assises of which so much will be said hereafter; the *assisa utrùm fœdum sit laicum an ecclesiasticum;* the *assisa mortis antecessoris;* and the *assisa novæ disseisinæ*. Again, in the statute of Northampton there is mention of a person *rectatus de murdro per sacramentum duodecim militum de hundredo*, and *per sacramentum duodecim liberorum legalium hominum*.

THUS have we endeavoured to trace the origin and history of *the trial by twelve men sworn to speak the truth*, down to the time of Glanville: a further and more particular

[m] Ch. 6. [n] Ch. 9.

account

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account of it we shall defer, till we come to speak more minutely of the proceedings of courts at this time.

Of deeds.

ANOTHER novelty introduced by the Normans, was the practice of making deeds with seals of wax and other ceremonies[o]. The variety of deeds which soon after the Conquest were brought into use, and the divers ways in which they were applied for the purpose of transferring, modifying, or confirming rights, deserve a very particular notice.

DEEDS or writings, from the time of the Conquest, were sometimes called *chirographa*, but more generally *chartæ*: the latter became a term of more common use, and so continued for many years; the former rather denoted a species of the *chartæ*, as will be seen presently. Charters were executed with various circumstances of solemnity, which it will be necessary to consider: these were the seal, indenting, date, attestation, and direction, or compellation.

CHARTERS were sometimes brought into court; either the king's, or the county, hundred, or other court, or into any numerous assembly; and there the act of making, or acknowledging and perfecting the charter was performed. This accounts for the number of witnesses often found to old charters, with the very common addition of *cum multis aliis*. When charters were not executed in this public manner, they were usually attested by men of character and consequence: in the country, by gentlemen and clergymen; in cities and towns, by the mayor, bailiff, or some other civil officer[p].

THE Anglo-Saxon practice of affixing the cross still continued; yet was not so frequent as before; but gave way to a method which more commonly obtained after the Conquest, namely, that of affixing a *seal of wax*. Seals of wax were of various colours. They were commonly round or oval, and were fixed to a label of parchment, or

[o] Wilk. Leg. Sax. 289. [p] Mad. Form. Diff. 26.

to

to a silk string fastened to the fold at the bottom of the charter, or to a slip of the parchment cut from the bottom of the deed, and made pendulous. Besides the principal seal there was sometimes a counter-seal, being the private seal of the party. If a man had not his own seal, or if his own seal was not well known, he would use that of another; and sometimes, for better security, he would use both his own and that of some other better known.

THE original method of *indenting* was this. If a writing consisted of two parts, the whole tenor of it was written twice upon the same piece of parchment; and, between the contents of each part, the word *chirographum* was written in capital letters, and afterwards was cut through in the midst of those letters; so that, when the two parts were separated, one would exhibit one half of the capital letters, and one the other; and when joined, the word would appear entire. Such a charter was called *chirographum*. About the reign of *Richard* and *John*, another fashion of cutting the word *chirographum* came into use; it was then sometimes done *indent-wise*, with an acute or sharp incision, *instar dentium*[q]; and from thence such deeds were called *indenturæ*.

CHARTERS were sometimes dated, and very commonly they had no date at all; but as they were always executed in the presence of somebody, and often in the presence of many, the names of the witnesses were inserted, and constituted a particular clause, called *his testibus*. The names of the witnesses were written by the clerk who drew the deed, and not by the witnesses themselves, who very often could not write. It seems, that wives were sometimes witnesses to deeds made by their husbands; monks and other religious persons to deeds made by their own houses; even the king is found as witness to the charters of private men[r]; and in the time of Richard and John, it came in

[q] Mad. Form. Diff. 14. 28, 29.

[r] Ibid. 31.

prac-

practice for him to attest his own charters himself in the words *teste meipso*.

CHARTERS were usually conceived in the stile of a letter, and, at the beginning, they had a sort of direction, or compellation. These were various. In royal charters, it was sometimes, *omnibus hominibus suis Francis & Anglis*: in private ones, sometimes, *omnibus sanctæ ecclesiæ filiis*; but more commonly, *sciant præsentes et futuri*, or *omnibus ad quos præsentes literæ*, &c.

THUS far of the circumstances and solemnities attending the execution of charters. Let us now consider the different kinds of them; and it will be found, that as they were called *chirographa*, or *indenturæ*, from their particular fashion, so they received other appellations expressive of their effect and design. A charter was sometimes called *conventio*, *concordia*, *finalis concordia*, and *finalis conventio*. There were also *feoffments*, *demises* for *life* and for *years*, *exchanges*, *mortgages*, *partitions*, *releases*, and *confirmations* [t].

CONVENTIO and *concordia* had both the same meaning, and signified some agreement, according to which one of the parties conveyed or confirmed to the other any lands, or other rights.

Of feoffment.

OF all charters the most considerable was a *feoffment*. After the time of the Conquest, whenever land was to be passed in fee, it was generally done by feoffment and delivery or livery of seisin [u]. This might be without deed; but the gift was usually put into writing, and such instrument was called *charta feoffamenti*. A feoffment originally meant the grant of a *feud* or *fee*; that is, a barony or knight's fee, for which certain services were due from the feoffee to the feoffor: this was the proper sense of the word: but by custom it came afterwards to signify also a grant of a free *inheritance* to a man and his heirs, referring rather to the perpetuity of

[t] Mad. Form. Diff. 32. [u] Ibid. 3. [u] Wilk. Leg. Sax. 289.

estate

eſtate than to the feudal tenure. The words of donation were generally, *dediſſe*, *conceſſiſſe*, *confirmáſſe*, or *donáſſe*, ſome one or other of them. It was very late, and not till the reign of Richard II. that the ſpecific term *feoffavi* was uſed. Theſe feoffments were made *pro homagio et ſervitio*, to hold of the feoffor and his heirs, or of the chief lord.

At this early period feoffments were very unſettled in point of form; they had not the ſeveral parts which, in after-times, they were expected regularly to contain. The words of limitation, to convey a fee, whether abſolute or conditional, were divers. A limitation of the former was ſometimes worded thus: to the feoffee *et ſuis*; or *ſuis poſt ipſum, jure hæreditario perpetuè poſſidendum*; or *ſibi et hæredibus ſuis vel aſſignatis*: of the latter thus: *ſibi et hæredibus procedentibus ex prædictâ*: *Richardo et uxori ſuæ et hæredibus ſuis, qui de eâdem veniunt*: *ſibi et hæredibus, qui de illo exibunt*: from which divers ways of limiting eſtates (and numberleſs other ways might be produced) it muſt be concluded, that no ſpecific form had been agreed on as neceſſarily requiſite to expreſs a ſpecific eſtate; but the intention of the grantor was collected, as well as could be, from the terms in which he had choſen to convey his meaning[x].

It appears, that a charter of feoffment was ſometimes made by a feme covert, though generally with the conſent of the huſband; and a huſband ſometimes made a feoffment to his wife. A feoffment was ſometimes expreſſed to be made with the aſſent of the feoffer's wife[y]; or of ſuch a one, heir[z] of the feoffor; or of more than one, heirs of the feoffor[a]; though in ſuch caſes, the charter appears to be ſealed only by the feoffor. By the aſſent of the wife, probably, her claim of dower was in thoſe days held to be barred; and indeed, when ſuch feoffment was made publicly in court, it had the notoriety of a fine; and might conſiſtently enough with modern notions, be allowed the

[x] Wilk. Leg. Sax. 5.
[y] Mad. Form. 148.
[z] Mad. Form. 316.
[a] Ibid. 319.

efficacy

efficacy since attributed to fines in the like cases. The assent of the heirs was, probably, where the land had descended from the ancestor of the feoffor; or where by usage it retained the property of *bocland*, not to be aliened *extra cognationem*, without the consent of the heir, where such restriction had been imposed by the original *landboc*.

A CLAUSE of *warranty* was always inserted; which sometimes, too, had the additional sanction of an oath. The import of this warranty was, that should the feoffee be evicted of the lands given, the feoffor should recompense him with others of equal value [b].

A CHARTER of feoffment was not a complete transfer of the inheritance, unless followed by *livery of seisin*. This was done in various ways; as *per fustem*, *per baculum*, *per haspam*, *per annulum*, and by other symbols, either peculiarly significant in themselves, or accommodated by use, or designation of the parties, to denote a transmutation of possession from the feoffer to the feoffee.

THIS was the nature of a feoffment with livery of seisin, as practised in these early times. It was the usual and most solemn way of passing inheritances in land; but yet was not of so great authority as a *fine*, which had the additional sanction of a record to preserve the memory of it.

A fine.

THE antiquity of *fines* has been spoken of by many writers. Some have gone so far as to assert their existence and use in the time of the Saxons [c]. But upon a strict enquiry, it is said there are no *fines*, properly so called, before the Conquest, though they are frequently met with [d] soon after that period [e].

WE shall now consider the manner in which fines have been treated, or, as it is now called, *levied*. The account of fines given by Glanville does not enable us to fix any

[b] Mad. Form. 7.

[c] Plowd. 360.

[d] Mad. Form. Diss. ibid.

[e] The origin of fines is very fully considered by Mr. Cruise, in his valuable Essay on Fines, who thinks, and with great shew of reason, that fines were contrived in imitation of a similar judicial transaction in the civil law. Cruise's Fines, p. 5.

precise

preciſe idea of the method of tranſacting them. It only appears from him, that this proceeding was a final concord made by licence of the king, or his juſtices[f], in the king's court. But the nature of a fine may be better collected from the more ſimple manner in which it was originally conducted.

THE parties having come to an agreement concerning the matters in diſpute, and having thereupon mutually ſealed a *chirographum*, containing the terms of their agreement, uſed to come into the king's court in perſon, or by attorney, and there recognize the concord before the juſtices. it was thereupon, after payment of a fine, enrolled immediately, and a counterpart delivered to each of the parties[g]. This was the moſt antient way of paſſing a fine. In courſe of time, fines came to be paſſed with a *chirographum*, upon a *placitum* commenced by original writ, as in a writ of covenant, *warrantia chartæ*, or other writ. When the mutual ſealing of a *chirographum* was entirely diſuſed, there ſtill remained a footſtep of this antient practice; for there continues to this day in every fine a chirograph, as it is called, which is reputed as eſſentially neceſſary to evidence that a fine has been levied.

THE deſign of *final concords* ſeems to have been anciently as various as the matters of litigation or agreement among men. By fines were made grants of land in fee, releaſes, exchanges, partitions, or any convention relating to land, or other rights: in a word, every thing might be tranſacted by fine which might be done by *chirographum*[h].

THUS far of the two great conveyances in practice for transferring eſtates of inheritance, namely, *feoffments* and *fines*. The manner in which eſtates for life or for years (ſince called demiſes) were made, was in the way of convention or covenant[i].

TWO other ſpecies of conveyance then uſed were *confirmations* and *releaſes*. In thoſe unſettled times, when feof-

[f] Lib. 8. c. 1.
[g] Mad. Form. Diſſ. 14.
[h] Mad. Form. Diſſ. 16, 17.
[i] Ibid. 22.

fees

fees were frequently diſſeiſed upon ſome ſuggeſtion of dormant claims, charters of confirmation were in great requeſt. Many confirmations uſed to be made by the feoffor to the feoffee, or to his heirs or ſucceſſors. Tenants in thoſe times hardly thought themſelves ſafe againſt great lords who were their feoffors, unleſs they had repeated confirmations from them or their heirs. Releaſes were as neceſſary from hoſtile claimants, as confirmations from feoffors. The words of *confirmation* were *dedi*, *conceſſi*, or *confirmavi*; and ſuch deeds are diſtinguiſhable from original feoffments, only by ſome expreſſions referring to a former feoffment. *Releaſes* are known by the words *quietum clamavi*, *remiſi*, *relaxavi*, and the like.

DURING the time which had elapſed ſince the Conqueſt, the Norman law had ſufficient opportunity to mix with all parts of our Saxon cuſtoms. This change was not confined to the article of tenures, duel, juries, and conveyances. The manner in which juſtice was adminiſtered makes a diſtinguiſhed part of the new juriſprudence. In the Saxon times, all ſuits were commenced by the ſimple act of the plaintiff lodging his complaint with the officer of the court where the cauſe was to be heard; and this ſtill continued in the county and other inferior courts of the old conſtitution. But when it had become uſual to remove ſuits out of theſe inferior courts, or of beginning them more frequently in the king's court; it became neceſſary to agree upon ſome ſettled forms of precepts applicable to the purpoſe of compelling defendants to anſwer the charge alledged by plaintiffs. Such a precept was called *breve*; probably, becauſe it contained *briefly* an intimation of the cauſe of complaint. It was directed to the ſheriff of the county where the defendant lived, commanding that he ſhould ſummon the party to appear in ſome particular court of the king, there to anſwer the plaintiff's demand, or to do ſome other thing tending to ſatisfy the ends of juſtice.

Of writs.

THE

THE neceſſity of ſuch *brevia* was very obvious; for tho', while moſt ſuits were tranſacted in the county court, it was ſufficient to enter a plaint with the officer of the court; and the proceſs iſſuing thereupon being to be executed by the ſheriff, who was preſent, or ſuppoſed to be preſent, in court, as judge, was not likely to be extremely illegal or irregular, even when warranted perhaps by nothing more authentic than verbal directions; yet, when ſuits were commenced in the king's court, at a great diſtance from the habitation of the parties, and proceſs was to iſſue to him merely as an officer, who knew nothing more of the matter than what the precept explained, it was neceſſary that ſomething more particular ſhould be exhibited to him; and therefore, that the precept ſhould be *written*. Hence perhaps it is, that the *breve* was called alſo a *writ*[k].

THESE *writs* were of different kinds, and received different appellations, according to the object or occaſion of them. The diſtinction between writs furniſhed a ſource of curious learning, which led to many of the refinements afterwards introduced into the law. The aſſigning of a writ of a particular frame and ſcope to each particular cauſe of action; the appropriating proceſs of one kind to one action, and of a different kind to another; theſe and the like diſtinctions rendered proceedings very nice and complex, and made the conduct of an action a matter of conſiderable difficulty.

Of records.

THE cultivation of this kind of learning was encouraged by a regulation of the new law, which was deſigned for the more uſeful purpoſe of preſerving the judgments and opinions of judges for the inſtruction of ſucceeding ages: this was the practice of entering proceedings of courts upon a roll of parchment, which was then called *a record*.

THE practice of regiſtering upon *rotuli*, or rolls of parchment, was entirely Norman; nor did it obtain to any great extent till long after the Conqueſt. Among the Saxons, the

[k] We have before ſeen that deeds, among the Saxons, were called *Gewrite*. Vid. ant. p. 10.

manner

manner of regiſtering was by writing on both ſides of the leaf; and this was either in ſome *evangeliſterium*, or other monaſtic book, belonging to a religious houſe. It was thus, that the memory not only of pleas in courts, but of purchaſes of land, teſtaments, and of other public acts, was preſerved. This practice, like other Saxon uſages, continued long after the invaſion of William. We find that Domeſday, the moſt important record of the Exchequer in thoſe times, conſiſts of two large books. But in the time of Henry I. we find *rotuli annales* in the Exchequer for recording articles of charge and diſcharge, and other matters of accompt relating to the king's revenue. It is conjectured that the making inrolment of judicial matters in the *curia regis* was poſterior in point of time to the ſame practice in matters of revenue; and was dictated by the experience of its utility in that important department[1]. This innovation gave riſe to the diſtinction between *courts of record*, and courts not of record.

A RECORD begun with the entry of the original writ; rehearſed the ſtatement of the demand, the anſwer or *plea*, the judgment of the court, and execution awarded. Thus a record contained a ſhort hiſtory of an action through all its ſtages. When proceedings were entered in this ſolemn manner, and ſubmitted to the criticiſm and exception of the adverſe party, it became very material to each that his part of the record ſhould be drawn with all accuracy and preciſion. When this attention was obſerved in completing a record, it became a very authentic guide in ſimilar caſes. Records were in high eſtimation; and, as they continued the memorials of judicial opinions, tended to fix the rules and doctrines of our law upon the firm baſis of precedent and authority.

SUCH were the more conſpicuous parts of the juridical ſyſtem introduced by the Normans, and ſuch were the changes they underwent during the period that elapſed before the end of the reign of king John.

[1] See Ayloffe's Antient Charters, Introd.

## CHAP. III.

## WILLIAM the CONQUEROR to JOHN.

*Of Villains—Dower—Alienation—"Nemo poteſt eſſe Hæres et Dominus"—Of Deſcent—Of Teſtaments—Of Wardſhip—Marriage—Of Baſtardy—Uſurers—Of Eſcheat—Maritagium—Homage—Relief—Aids—Adminiſtration of Juſtice—A Writ of Right—Eſſoins—Of Summons—Of Attachment—Counting upon the Writ—The Duel—The Aſſiſe—Vouching to Warranty—Writ of Right of Advowſon—Of Prohibition to the Eccleſiaſtical Court—The Writ de Nativis—Writ of Right of Dower—Dower unde Nihil.*

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IN the former chapter it was endeavoured to trace the hiſtory of the principal changes made in the law from the time of William the Conqueror down to the reign of king John; but the object of this work being to give a correct idea of the origin and progreſs of our whole judicial polity, ſomething more ſatisfactory will be expected than the foregoing deduction. It will be required to ſtate fully and at length, what was the condition of perſons and property; how juſtice, both civil and criminal, was adminiſtered; with the proceſs, proceeding, and judgments of courts; in ſhort, to give a kind of treatiſe of the old juriſprudence, with a preciſion, and from an authority, that will at once inſtruct the curious, and have weight with the learned. When this is done, it will be a foundation on which the ſuperſtructure of our juridical hiſtory may be raiſed with conſiſtence; every modification, and addition, being purſued in the order in which it aroſe, the connexion and dependence of the ſeveral parts will be viewed in a new

light; and the reaſon and grounds of the law be inveſtigated and explained more naturally, and it is truſted with more ſucceſs than in any diſcourſe, or deſultory comment upon our ancient ſtatutes, however copious and learned.

In order to lay this foundation of the ſubſequent Hiſtory, it ſeems, that ſome point of time during the period between the Conqueſt and the reign of king John ſhould be choſen, and that the contemporary law of that time, in all its branches, ſhould be ſtated with preciſion and minuteneſs. The laws of Edward the Confeſſor, conſidered, according to the preſent opinion, as a performance of ſome writer in the reign of William Rufus, and the laws of Henry I. are the earlieſt documents that could at all be viewed with any hopes of information of this kind; but theſe throw ſo little light on the Norman juriſprudence, that they furniſhed ſmall aſſiſtance, even in the hiſtorical ſketch contained in the preceding chapter. The new juriſprudence ſeems not to have been thoroughly eſtabliſhed, or at leaſt tolerably explained, till the reign of Henry II. when we meet with the treatiſe of Glanville. The method, ſcope, and extent of this venerable book mark the reign of Henry II. as the moſt favourable period for our purpoſe. As, therefore, it may be collected with conſiderable accuracy from that author, what the law was towards the end of the reign of Henry II. we ſhall, with his aid, take a complete view of it; and having done that, we ſhall proceed with more confidence to conſider the ſubſequent changes made by parliament and by courts in the reigns of Henry III. Edward I. and his ſucceſſors, as to an enquiry that may be followed with eaſe, inſtruction, and delight. This account of our laws at the cloſe of Henry II.'s reign will be divided into the rights of perſons, the rights of things, and the proceedings of courts. We ſhall begin with the firſt.

The people, as among the Saxons, were divided into freemen and ſlaves; though the latter aſſumed under the Norman polity a new appellation, and were called *villani*, or *villains*.

Of

Of villains.

Of villains, thoſe were called *nativi* who were ſuch *à nativitate;* as when one was deſcended from a father and mother who were both villains *à nativitate.* If a freeman married a woman who was born a villain, and ſo held an eſtate in villenage, in her right, as long as he was bound to the villain ſervices due on account of ſuch tenure, he loſt, *ipſo facto*, his *lex terræ*, as a villain *à nativitate.* If children were born from a father who was *nativus* to one lord, and a mother who was *nativa* to another lord, ſuch children were to be divided proportionably between the two lords [a].

A VILLAIN might obtain his freedom in ſeveral different ways. The lord might quit-claim him from him and his heirs for ever; or might give or ſell him to ſome one, in order to be made free: though it ſhould be obſerved, that a villain could not purchaſe his freedom with his own money; for he might in ſuch caſe, notwithſtanding the ſuppoſed purchaſe, be claimed as a villain by his lord; for all the goods and chattels of one who was a *nativus* were underſtood to be in the power of his lord, ſo as that he could have no money, which could be called his own, to lay out in a redemption of his villenage. However, if ſome ſtranger had bought his freedom for him, the villain might maintain ſuch purchaſed freedom againſt his lord; for it was a rule, that where any one quit-claimed a villain *nativus* from him and his heirs, or ſold him to ſome ſtranger, the party who had ſo obtained his freedom, if he could eſtabliſh it by a charter, or ſome other legal proof, might defend himſelf againſt any claims of his lord and his heirs: he might defend his freedom in court by duel, if any one called it in queſtion, and he had a proper witneſs who heard and ſaw the manumiſſion. But though a man could make his villain *nativus* free, as far as concerned *his* claim, and that of his heirs, he could not put him in a condition to be conſidered as ſuch by others; for if ſuch a freed man was produced

[a] Glanv. lib. 5. c. 6.

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in court againſt a ſtranger to deraign a cauſe (that is, to be the champion to prove the matter in queſtion), or to make his law [b], or law-wager, as it has ſince been called, and it was objected to him that he was born in villenage, the objection was held a juſt cauſe to diſqualify him for thoſe judicial acts; nor could the original ſtain, ſays Glanville, be obliterated, though he had ſince been made a knight. Again, a villain *à nativitate* would become *ipſo facto* free, if he had remained a year and a day in any privileged town, and was received into their *gylda* (or guild, as it has ſince been called) as a citizen of the place [c].

NOTHING is ſaid by Glanville concerning the different ranks of freemen; we ſhall therefore proceed to the next object of conſideration, which is, the right to property claimed by individuals under various titles and circumſtances; as *dos*, or dower, belonging to a widow, *maritagium*, and the like; after which we ſhall ſpeak more particularly about ſucceſſion to lands, and the nature of tenures, as the law ſtood in the reign of Henry II.

Dower.

THE term *dos*, or dower had two ſenſes. In the common and uſual ſenſe, it ſignified that property which a freeman gave to his wife *ad oſtium eccleſiæ*, at the time of the eſpouſals. We ſhall firſt ſpeak of *dos* in this ſenſe of it. When a perſon endowed his wife, he either named the dower ſpecially, or did not. If he did not name it ſpecially, the dower was underſtood, by law, to be the third part of the huſband's *liberum tenementum*; for the rule was, that a reaſonable dower of a woman ſhould be a third part of her huſband's freehold which he had at the time of the eſpouſals, and was ſeiſed of in demeſne. If he named the dower eſpecially, and it amounted to more than the third, ſuch ſpecial dower was not allowed, but it was to be admeaſured to a fair third; for, though the law permitted a man to give leſs than a third in dower, it would not ſuffer him to give more [d].

[b] *Legem facere.* [c] Glanv. lib. 5. c. 5. [d] Ibid. lib. 6. c. 1.

IF

If a man had but a small freehold at the time of the espousals when he endowed his wife, he might afterwards augment it to a third part, out of purchases he had made since; but if there had been no provisional mention of new purchases at the time of such assignment of dower, although the husband had then but a small portion of freehold, and had made great acquisitions since, the widow could not claim more than the third part of the land he had at the time of the espousals. In like manner, if a person had no land and endowed his wife with chattels, money, or other things, and afterwards made great acquisitions in land, she could not claim any dower in such acquisitions; for it was a general rule, that where dower was specially assigned to a woman *ad ostium ecclesiæ*, she could not demand more than what was then and there assigned[d].

A WOMAN could make no disposal of her dower during her husband's life; but as a wife was considered *in potestate viri*, it was thought proper that her dower and the rest of her property should be as completely in his power to dispose of them; and therefore every married man, in his lifetime, might give, or sell, or alien in any way whatsoever, his wife's dower; and the wife was obliged to conform in this, as in all other instances, to his will. It is, however, laid down by Glanville, that this assent might be with-held: and if, notwithstanding this solemn declaration of her dissent[e] and disapprobation, her dower was sold, she might claim it at law after her husband's death; and, upon proof of her dissent, she could recover it against the purchaser[f]. Besides, it must be remarked, that the heir in such case was bound to deliver to the widow the specific dower assigned her, if he could; and if he could not procure the identical land, he was to give her a reasonable *excambium*,

[d] Glanv. lib. 6. c. 2.

[e] The word used by Glanville is *contradicere*, which, in this and other places, he seems to use in a sense implying something more formal and solemn than a common dissent and disapprobation.

[f] Glanv. lib. 6. c. 3.

as it was called, or recompence in value; and if he delivered her the land that was ſold, he was in like manner bound to give a recompence to the purchaſer [g]. If the aſſignment at the church-door was in theſe words, "*Do tibi terram iſtam cum omnibus pertinentiis;* and he had no appurtenances in his demeſne at the time of the eſpouſals, but he either recovered by judgment, or in ſome other lawful way acquired ſuch appurtenances; the wife might, after his death, demand them in right of her dower [h].

If there was no ſpecial aſſignment of dower, the widow was entitled, as we before ſaid, to the third part of all the freehold which her huſband had in demeſne the day of the eſpouſals, complete and undiminiſhed, with its appurtenances, lands, tenements, and advowſons; ſo that ſhould there be only one church, and that ſhould become vacant in the widow's life-time, the heir could not preſent a parſon without her conſent. The capital meſſuage was always exempt from the claim of dower, and was to remain whole and undivided; nor were ſuch lands to be brought into the diviſion for dower, which other women held in dower upon a prior endowment. Again, if there were two or more manors, the capital manor, like the capital meſſuage, was to be exempted, and the widow was to be ſatisfied with other lands. It was a rule, that the aſſignment of dower ſhould not be delayed on account of the heir being within age.

If land was ſpecially aſſigned for dower *ad oſtium eccleſiæ*, and a church was afterwards built within the fee, the widow was to have the free preſentation thereof; ſo as, upon a vacancy, to give it to a clerk, but not to a college, becauſe that would be depriving the heir of his right for ever; however, ſhould the huſband in his life-time have preſented a clerk, the preſentee was to enjoy it during his life, though the preſentation was made after the wife had

[g] Glanv. lib. 6. c. 13. [h] Ibid. c. 12.

been

been endowed of the land, and it might look like an anticipation and infringement of the profits and advantage to which she was entitled by her special assignment of dower. Yet, should the husband himself have given it to a religious house, as this would be an injury to the wife similar to that above stated respecting the heir, the church after his death was to be delivered back to the widow, that she might have free presentation to it; but after her death, and that of her clerk, the church would return back to the religious house to be possessed for ever.

If a woman had been separated from her husband *ob aliquam sui corporis turpitudinem*, or on account of blood and consanguinity, she could not claim her dower; and yet in both these cases the children of the marriage were considered as legitimate, and inheritable to their father. Sometimes a son and heir married a woman *ex consensu patris*, and gave her in dowry some part of his father's land, by the assignment of the father himself. Glanville states a doubt upon this; whether in this case, any more than in that of an assignment by the husband himself, the widow could demand more than the particular land assigned; and whether upon the death of the husband before the father, she could recover the land, and the father be bound to warrant her in the possession of it[1]?

Thus far of one sense of the word *dos*. It was understood differently in the Roman law, where it properly signified the portion which was given with the woman to her husband; which corresponds with what was commonly called in our law *maritagium*: but we shall defer saying any thing of *maritagium* till we have considered the nature of alienation and descent, with some other properties of land.

Respecting the alienation of land, the first consideration that presents itself, is the indulgence allowed in favor of

[1] Glanv. lib. 6. c. 17.

gifts

gifts *in maritagium*. Every freeman, says Glanville, might give part of his land with his daughter, or with any other woman, *in maritagium*, whether he had an heir or not, and whether his heir agreed to it or not; nay, though he made that solemn declaration of his dissent, which, we have just seen, had the effect of rendering an alienation of dower ineffectual and void [k]. A person might give part of his freehold *in remunerationem servi sui*, or to a religious place in free alms; so that, should such donation be followed by seisin, the land would remain to the donee and his heirs for ever, if an estate of that extent had been expressed by the donor; but if the gift was not followed by seisin, nothing could be recovered against the heir without his consent: for such an incomplete gift was considered by the law rather as a *nuda promissio* than a real donation. Thus then, on the above occasions, any one might, in his lifetime, give a reasonable part of his land to whomsoever he pleased; but the same permission was not granted to any one *in extremis*; lest men, wrought upon by a sudden impulse, at a time when they could not be supposed to have full possession of their reason, should make distributions of their inheritances highly detrimental to the interest and welfare of tenures. The presumption, therefore, of law in case of such gifts was, that the party was insane, and that the act was the result of such insanity, and not of cool deliberation. However, according to Glanville, even a *gift* made *in ultimâ voluntate* was good, if assented to and confirmed by the heir [l].

Alienation.

In the alienation of land some distinctions were made between *hæreditas* and *quæstus*, land descended as an *inheritance*, and land acquired by *purchase*. If it was an inheritance, he might, as was said, give it to any of the beforementioned purposes. But, on the other hand, if he had more sons than one who were *mulieratos*, that is, born in

[k] Glanv. lib. 7. c. 1. [l] Ibid.

wedlock,

wedlock, he could not give any part of the inheritance to a younger ſon againſt the conſent of the heir; for it might then happen, from the partiality often felt by parents towards their younger children, that, to enrich them, the eldeſt would be ſtripped of the inheritance. It was a queſtion whether a perſon, having a lawful heir, might give part of the inheritance to a baſtard-ſon; for if he could, a baſtard would be in better condition than a younger ſon born in wedlock; and yet it ſhould ſeem that the law allowed ſuch donation to a baſtard ſon.

If the perſon who wanted to make a donation was poſſeſſed only of land by *purchaſe*, he might make a gift, but not of all his purchaſed land; for he was not, even in this caſe, allowed intirely to diſinherit his ſon and heir: tho' if he had no heir male or female of his own body, he might give all his purchaſed lands for ever; and if he gave ſeiſin thereof in his life-time, no remote heir could invalidate the gift. Thus a man, in ſome caſes, might give away, in his life-time, all the land which he had himſelf purchaſed, but not, as in the civil law, make ſuch donee his heir; for, ſays Glanville, *ſolus Deus hæredem facere poteſt, non homo.*

If a man had lands both by inheritance and by purchaſe, then he might give all his purchaſed land to whomſoever he pleaſed, and afterwards might diſpoſe of his lands by inheritance, in a reaſonable way, as before ſtated. If a perſon had lands in free ſoccage, and had more ſons than one, who by law ſhould inherit by equal portions, the father could not give to one of them, either out of lands purchaſed or inherited, more than that reaſonable part which would belong to him by deſcent of his father's inheritance: but the father might give him his ſhare.

We may here obſerve, that many queſtions of law aroſe, owing to certain conſequences which ſometimes reſulted from this liberality of fathers towards their children. Firſt, ſuppoſe a knight, or freeman, having four

four or more ſons, all born of one mother, gave to his ſecond ſon, to him and his heirs, a certain reaſonable part of his inheritance, with the conſent of the eldeſt ſon and heir (to avoid all objections to the gift), and ſeiſin was had thereof by the ſon, who received the profits during his life, and died in ſuch ſeiſin, leaving behind him his father and all his brothers alive; there was a great doubt among lawyers, in Glanville's time, who was the perſon by law entitled to ſucceed. The father contended, he was to retain to himſelf the ſeiſin of his deceaſed ſon, thinking nothing more reaſonable than that the land which was diſpoſed of by his donation, ſhould revert again to him. To this it might be anſwered by the eldeſt ſon, that the father's claim could not be ſupported; for it was a rule of law, *quòd nemo ejuſdem tenementi ſimul poteſt eſſe hæres et dominus*[m], that no one could be both heir and lord of the ſame land: and by the force of the ſame rule, the third ſon would deny that the land could revert to the eldeſt; for as he was heir to the whole inheritance, he could not, as before ſaid, be at once heir and lord; for he would become lord of the whole inheritance upon the death of his father, and therefore ſtood very nearly in the predicament in which we juſt ſtated the father himſelf to be. Thus, as by law the land could not remain with him, there was no reaſon, ſays Glanville, why he ſhould recover it; and therefore, by the ſame reaſoning, it appeared to Glarville, that the third ſon was to exclude all the other claimants.

*Nemo poteſt eſſe hæres et dominus.*

A LIKE doubt aroſe, when a brother gave to his younger brother and his heirs a part of his land, and the younger brother died without heirs of his body; upon which the

[m] In the times of Glanville and Bracton, the reſervation of ſervices might be made either to the feoffor or to the lord of whom the feoffor held; they ſeem, more commonly, to have been made in the former manner: thus every ſuch new feoffment in fee made a new tenure, and of courſe created a new manor; and ſo the law continued till ſtat. *quia emptores*, 18 *Ed.* I. required feoffments in fee to be made with reſervation of the ſervices to the chief lord.

elder

elder took the land into his hands, as being vacant and within his fee, againſt whom his own two ſons prayed an aſſiſe of the death of their uncle; in which plea the eldeſt ſon might plead againſt the father, and the younger ſon againſt his elder brother, as before mentioned. And here the law is ſtated by Glanville to be this: that the father could not by any means retain the land, becauſe he could not *ſimul hæres eſſe et dominus*; nor could it revert to the donor, with the homage neceſſarily incident to it, if the donee had any heir, either of his body or more remote. Again, land thus given, like other inheritances, naturally deſcended to the heir, but never aſcended: from all which it followed, that the plea as between the father and eldeſt ſon was at an end, as having no queſtion in it; but that between the eldeſt and younger ſon went on, as before ſtated. And in this laſt caſe the king's court had taken upon it to determine, *ex æquitate*, that the land ſo given ſhould remain to the eldeſt ſon (particularly if he had no other fee) to hold till the paternal inheritance deſcended upon him; for while he was not yet lord of his paternal inheritance, the rule *quòd nemo ejuſdem tenementi ſimul poteſt hæres eſſe et dominus*, could not be ſaid to ſtand in the way. But then it might be aſked, whether, when he became by ſucceſſion *lord* of that part of the inheritance, he was not *heir* alſo of it, as well as of the reſt of the inheritance, and then fell within the meaning of that rule? To this Glanville anſwers, that it was a thing not at firſt certain, whether the eldeſt ſon would be the heir, or not; for ſhould the father die firſt, he moſt undoubtedly would be ſo; and then he would ceaſe to be lawful owner of the land he had acquired by ſucceſſion from the uncle, and it would revert to the younger ſon as right heir: yet if, on the other hand, the eldeſt ſon died firſt, then it was plain he was to be the heir of the father; and therefore thoſe two requiſites of this rule, namely, the *jus hæreditarium* and *dominium*, did not concur in the ſame perſon. Such is the reaſoning of Glanville

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Glanville upon this curious point, in the law of deſcent, as underſtood in his time [n].

THERE are two obſervations to be made reſpecting gifts of land, and then we ſhall proceed to conſider the law of deſcent more fully. One is, that biſhops and abbots, whoſe baronies were held by the eleemoſynary gift of the king and his anceſtors, could not make gifts of any part of their demeſnes, without the aſſent and confirmation of the king [o]: the other is, that the heirs of a donor were bound to warrant to the donee and his heirs the donation, and the thing thereby given [p].

Of deſcent.

HAVING incidentally alluded to ſome rules which governed the deſcent of lands, it will now be proper to treat of the law of ſucceſſion more at large. They divided heirs into thoſe they called *proximi*, and thoſe they conſidered as *remotiores*. *Proximi* were thoſe begotten from the body, as ſons and daughters: upon the failure of theſe, the *remotiores* were called in, as the *nepos* or *neptis*, the grandſon or grand-daughter, and ſo on, deſcending in a right line *in infinitum*; then the brother and ſiſter, and their deſcendants; then the *avunculus* [q], or uncle, as well on the part of the father as of the mother; and in like manner the *matertera*, or aunt; and their deſcendants. When therefore a perſon died leaving an inheritance, and having one ſon, it was a ſettled thing that the ſon ſucceeded to the whole. If he left more ſons than one, then there was a difference between the caſe of *a knight*, that is, a tenant by *fœdum militare*, or knight's ſervice; and a *liber ſokemannus*, or *free ſokeman*. If he was a knight or tenant by military ſervice, then, according to the law of England, the eldeſt ſon ſucceeded to the father *in totum*; and none of his brothers had any claim whatſoever. But if he was a free ſokeman,

[n] Glanv. lib. 7. c. 1.

[o] Ibid.

[p] Ibid. c. 2.

[q] This is the expreſſion uſed by Glanville; which is not ſtrictly correct; *avunculus* and *matertera* being the uncle and aunt on the mother's ſide; as the uncle on the father's ſide was *patruus*. Indeed our author, after all, paſſes over this in a looſe way.

and

and poſſeſſed of ſoccage-land that had been antiently diviſible, then the inheritance was divided among all the ſons by equal parts; ſaving always to the eldeſt ſon, as a mark of diſtinction, the capital meſſuage; ſo, however, as he made a proportionate ſatisfaction to the other brothers on that account. But if the land was not anciently diviſible, then it was the cuſtom, in ſome places, for the eldeſt ſon to take the whole inheritance: in ſome, the youngeſt ſon.

If a perſon left only a daughter, then what we have ſaid of a ſon held good with regard to her. And it was a general rule, whether the father was a knight or a ſokeman, that where there were more daughters than one, the inheritance ſhould be divided among them; ſaving, however, (as in the caſe of the ſon) the capital meſſuage to the eldeſt daughter. Where the inheritance was thus diviſible between brothers or ſiſters, if one of them died without heirs of the body, the ſhare of the party deceaſed was divided amongſt the ſurvivors. It was a rule, in theſe diviſible inheritances, that the huſband of the eldeſt daughter ſhould do homage to the chief lord for the whole fee; the other daughters or their huſbands being bound to do their ſervices to the chief lord by the hand of the eldeſt, or her huſband; and not to do homage or fealty to the huſband of the eldeſt: nor were their heirs in the firſt or ſecond deſcent; but thoſe in the third deſcent from the younger daughters were bound by the law of the realm to do homage and pay a reaſonable relief to the heir of the eldeſt daughter for their tenement. It was a rule, that no huſbands ſhould give away their wives' inheritance, or any part thereof, without the aſſent of their heirs; nor could they releaſe any right that might belong to their heirs.

We have ſaid before, that if a perſon had a ſon and daughter, or daughters, the ſon ſucceeded *in totum*; and therefore, if a man had more wives than one, and had daughters from two, and at length a ſon from a third, this ſon would alone take the whole inheritance of his father; for

for it was a general rule, that a woman could never take part of an inheritance with a man[r], unleſs, perhaps, by the particular and ancient cuſtoms of ſome cities or towns: yet if a man had more wives than one, and had daughters from each, they all ſucceeded alike to the inheritance, the ſame as if they had been born of the ſame mother.

SUPPOSE a man died without leaving a ſon or a daughter, but had grandchildren; they ſucceeded in like manner as children; thoſe in the right line being always preferred to thoſe in the tranſverſe. However, we have before ſeen[s], that when a man left a younger ſon, and a grandſon of his eldeſt ſon, who was dead, there was great difficulty in determining the ſucceſſion in ſuch caſe between the ſon and grandſon. Some thought the younger ſon was more properly the right heir than the grandſon; for the eldeſt ſon not having lived till he became heir, the younger ſon, by outliving both his brother and father, ought properly to be the father's ſucceſſor. It ſeemed to others, that the grandſon ſhould be preferred to the uncle; for as he was heir of the body of the eldeſt ſon, and, if he had lived, would have had all his father's rights, he, it was ſaid, ſhould more properly ſucceed in the place of his father: and ſo Glanville thought, provided the eldeſt ſon had not been *foris-familiated* by the grandfather. A ſon was ſaid to be foris-familiated, if his father aſſigned him part of his land, and gave him ſeiſin thereof, and did this at the requeſt, or with the free conſent of the ſon himſelf, who expreſſed himſelf ſatisfied with ſuch portion; and it was clear law, that in ſuch caſe the heirs of the ſon could not demand as againſt their uncle, or any one elſe, any more of the inheritance of the grandfather than what was ſo aſſigned to their father; though the father himſelf, had he ſurvived the grandfather, might notwithſtanding have claimed more. Where it happened, however, that the

[r] Glanville's words are *mulier nunquam cum maſculo partem capit in hæreditate aliquâ.*

[s] Vid. ant. 41.

eldeſt

eldeſt ſon had in his father's life-time done homage to the chief lord of the fee for his father's inheritance, as was not unfrequently the caſe, and died before his father, there it was held beyond queſtion, that the ſon of ſuch eldeſt ſon ſhould be preferred to the uncle, although there had been no foris-familiation.

SUCH was the law of deſcent in Glanville's time; and this will very properly be followed by a ſhort view of ſome of the duties incumbent on heirs; with the incidents of inheritance and ſucceſſion; ſuch as teſtaments, wardſhip, baſtardy, and eſcheat.

Of teſtaments.

HEIRS, ſays Glanville, were bound to obſerve the teſtaments made by their fathers, or their other anceſtors to whom they were heirs, and to pay all their debts. For every freeman, not incumbered with debts beyond the amount of his effects, might, on his death-bed, make a reaſonable diviſion of his property, by will; ſo as he complied with the cuſtoms of the place where he lived; one of which commonly was, firſt, to remember his lord by his beſt and principal chattel; then the church; and after theſe, he might diſpoſe of the remainder as he pleaſed. However the cuſtoms of particular places might lay this reſtriction upon wills, no perſon was bound, by the general law of the kingdom, to leave any thing by will to any particular perſon, but was at liberty to act as he pleaſed; it being a rule of law, that *ultima voluntas eſſet libera*. A woman who was *ſui juris* might make a will; but if ſhe was married, ſhe could do nothing of this ſort without her huſband's authority, as it would be making a will of his goods. But Glanville thought it would be a proper teſtimony of affection and tenderneſs, for a huſband to give to his wife *rationabilem diviſam*, that is, a third part of his effects; this being what ſhe would be entitled to, if ſhe had ſurvived him; and it ſeems that it was not unfrequent for huſbands to give a ſort of property to their wives in this third part, even during the coverture.

THE

THE paſſage in Glanville from which this and the following account of teſtaments is taken, throws great obſcurity upon the ſubject, and lays a foundation for the doubt that long divided lawyers, and is not yet ſettled, reſpecting the power of making wills of chattels, at common law. After having expreſsly laid down, that, by the general law of the kingdom, no perſon was bound to leave any thing by will to any particular perſon, and that the third part left to the wife was dictated rather by a moral than legal obligation, he goes on in the following remarkable words: "When a perſon, ſays he, is about to make his will, if "he has more than enough to pay his debts, then all his "moveables ſhall be divided into three equal parts; of "which one ſhall go to the heir, another to the wife; the "third be reſerved to himſelf, over which he has the "power of diſpoſal as he pleaſes: if he dies without leav-"ing a wife, a half is to be reſerved to the teſtator[t]." Thus far reſpecting the law of teſtaments for the diſpoſition of moveables; to which he adds, conformably with what we have before ſhewn, that an inheritance could not be given by laſt will[u].

A TESTAMENT ought to be made in the preſence of two or more lawful men, either clergy or lay, being ſuch perſons as might afterwards become proper witneſſes thereto. The executors of a teſtament were ſuch perſons as the teſtator choſe to appoint to undertake the charge of it. If the teſtator appointed none, the *propinqui et conſanguinei*, by which were meant, as may be ſuppoſed, the neareſt of kin to the deceaſed, might interpoſe; and if there was any one, whether the heir or a ſtranger, who detained any effects of the deceaſed, ſuch executors or next of kin might have the following writ directed to the ſheriff, to cauſe a reaſonable diviſion of the effects to be made;

[t] The progreſs of this doctrine, and the diſcuſſions upon it, will be related in the proper place.

[u] Glanv. lib. 7. c. 5.

*Rex*

*Rex vicecomiti salutem: præcipio tibi quòd justè et sine dilatione facias stare rationabilem divisam N. sicut rationabiliter monstrari poterit quòd eam fecerit, et quòd ipsa stare debeat*, &c.[w]. If the person, summoned by authority of this writ, said any thing against the validity of the testament; that it was not properly made, or that the thing demanded was not bequeathed by it; such inquiry was to be heard and determined in the court christian; for all pleas of testaments, says Glanville, belong to the ecclesiastical judge, and are there decided upon by the testimony of those who were present at the making of the will[x].

If a person was incumbered with debts, he could not make any disposition of his effects (except it was for payment of his debts) without the consent of the heir; but if there was any thing remaining over and above the payment of his debts, that residue was to be divided into three parts, as above mentioned; and he might, says Glanville, make his will of the third part. Should the effects of the deceased not be sufficient to pay his debts, the heir was bound to make up the deficiency out of the inheritance which came to him; so that we see the reason why, under such circumstances, the heir's consent was necessary towards a will. It seems, however, that the heir was not bound to make up this deficiency, unless he was of age[y].

Heirs were considered in different lights, according as they were of full age, or not. An heir of full age might hold himself in possession of the inheritance immediately upon the death of the ancestor; and the lord, though he might take the fee together with the heir into his hands, was to do it with such moderation, as not to cause any disseisin to the heir; for the heir might resist any violence, provided he was ready to pay his relief and do the other services. Where the heir to a tenant holding by military service was under age, he was to be in custody of his

Of wardship.

[w] Glanv. lib. 7. c. 6. 7. [x] Ibid. c. 8. [y] Ibid.

lord till he attained his full age; which, in ſuch tenure, was when he had completed the twenty-firſt year. The ſon and heir of a ſokeman was conſidered as of age when he had completed his fifteenth year: the ſon of a burgeſs, or one holding in burgage tenure, was eſteemed of age, ſays Glanville, when he could count money and meaſure cloth, and do all his father's buſineſs with ſkill and readineſs. The lord, when he had cuſtody of the ſon and heir, and of his fee, had thereby, to a certain degree, the full diſpoſal thereof; that is, he might, during the cuſtody, preſent to churches, have the marriage of women, and take all other profits and incidents which belonged to the minor and his eſtate, the ſame as he might in his own; only he could make no alienation which would affect the inheritance. The heir was, in the mean time, to be maintained with a proviſion ſuitable to his eſtate; the debts of the deceaſed were to be paid in proportion to the eſtate and time it was in cuſtody of the lord, who was not by ſuch liens to be entirely deprived of his benefit by the cuſtody: with that qualification, however, lords were bound *de jure* to anſwer for debts of the anceſtor.

THE lord alſo, as he had all emoluments belonging to the heir, was to act in all his concerns, and proſecute all ſuits for recovery of his rights, where ſuch ſuits were not delayed by the uſual exception to the infancy of the party. But the lord was not bound to anſwer for the heir, neither upon a queſtion of right, or of ſeiſin, except only in one caſe; and that was, where there had fallen to the heir, ſince his father's death, the cuſtody of ſome minor: for then, if the minor came of age, and the inheritance was not delivered to him, he was intitled to have an aſſiſe and recognition *de morte anteceſſoris*: and in this caſe, as the recognition was not by law to remain, on account of the infancy of the heir, his lord was to anſwer for him. If a minor was appealed of felony, he was to be attached by ſafe and ſure pledges; but yet he was not bound to anſwer to the

the appeal till he was of age[z]. It was the duty of those who had the custody of heirs and their fees, to restore the inheritance to the heir in good condition, and also free from debts; in proportion, as was before said, to the size of the inheritance, and to the time it was in custody[a]. If there was any doubt whether an heir was of age or not, yet still the lord had the custody of the heir and his estate until he was proved to be of age by lawful men of the vicinage, upon their oaths.

If an heir within age had more lords than one, the chief lord, that is, he to whom he owed allegiance for his first fee, was to have the preference of the custody: an heir, however, so circumstanced, was still to pay to the lords of his other fees their reliefs and other services. In the case of a holding of the king *in capite*, the custody belonged to the king completely and fully, whether the heir held of other lords or not: for the maxim was, *dominus rex nullum habere potest parem, multò minùs superiorem*. But in burgage-tenure the king had not this preference to other lords. The king might commit to any one such custodies as belonged to him; and they were committed sometimes *pleno jure*, and sometimes not. In the latter case, the committee was to render an account thereof at the exchequer; in the former, not: in the former case, he might present to churches, and do other acts, as he might in his own estate[b].

This was the law concerning the custody of heirs, in military tenure. The heirs of *sokemen*, upon the death of their ancestors, were, according to Glanville, to be in the custody of their *consanguinei propinqui*, which must mean, as in a former passage, the next of kin; with this qualification, that if the inheritance descended *ex parte patris*, the custody belonged to the descendants *ex parte matris*; and so *vice versâ*. For the opinion was, that the custody of a person should not, by law, belong to one who, standing

[z] Glanville, lib. 7. c. 9. [a] Ibid. [b] Ibid. c. 10.

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near the ſucceſſion, might be ſuſpected of having views upon the inheritance [c].

Marriage.

We ſhall next ſpeak of the cuſtody of *female heirs*. If a woman was a minor, ſhe was to be in the cuſtody of her lord till ſhe became of full age, and then the lord was bound to find her a proper marriage. If there were more than one, he was to deliver to each her reaſonable portion of the inheritance. If a woman was of full age, then alſo ſhe was to be in the cuſtody of her lord till ſhe was married by his advice and diſpoſal; for it was the law and cuſtom of the realm, that no woman who was heir to land ſhould be married but by the diſpoſal and aſſent of her lord: and this rule operated ſo far, that if any one married his daughter, who was to be his heireſs, without the aſſent of his lord, he was by ſtrictneſs of law to be for ever deprived of his inheritance; nor could he retain it but by the mercy and pleaſure of the lord. Nevertheleſs, when ſuch a perſon applied to the lord for licence to marry his daughter, the lord was bound to give his conſent, or ſhew ſome reaſonable cauſe to the contrary: if not, the father might even proceed to marry her according to his own wiſh and inclination, without the lord's concurrence.

Upon this ſubject of marrying women Glanville puts a caſe: whether a woman poſſeſſed of land in dower might marry as ſhe pleaſed, without the aſſent of her *warrantor*, that is, the heir of her huſband; and whether by ſo doing ſhe would loſe her whole dower? Some thought ſhe ought not to loſe her dower, becauſe ſuch ſecond huſband was not by the law and cuſtom of the land bound to do *homage* to the warrantor, but only a ſimple *fealty*; which was merely, in caſe the wife ſhould die before the huſband, to preſerve the homage from being entirely loſt, for want of ſome outward mark of tenure. But, notwithſtanding that, Glanville thought ſhe was bound to obtain the aſſent of

[c] Glanv. lib. 7. c. 11.

her

her warrantor, or lose her dower, unless she had other lands, either by *maritagium* or by inheritance; for then it was sufficient if she had the assent of the chief lord: and this was on account of the simple fealty only which the husband was bound to do to the lord. If the inheritance was held of more than one lord, it was sufficient to obtain the assent of the chief lord[d].

If women, while in custody of their lords, did any thing which was a cause of forfeiture, and this was made out against them in a lawful way, the offender lost her right to the inheritance, and her share accrued to the rest; but if they had all incurred a forfeiture, then the whole inheritance fell to the lord, as an *escheat*.

Widows were not to be again in custody of their warrantors, though, as has already been related, they were to have their assent before they married. Women were not to forfeit their inheritance on account of any incontinence: not that the maxim, *putagium hæreditatem non adimit*, meant this indemnity of women in case of incontinence, for that was to be understood of the consideration the law had of a son begotten under such circumstances, and born after lawful wedlock; who was thereby intitled to succeed to the inheritance as a lawful heir; according to another rule, *filius hæres legitimus est, quem nuptiæ demonstrant*[e].

This brings us to consider the law of legitimacy. It was held, that no *bastardus*[f], or bastard, was a legitimate or lawful heir, nor any one not born in lawful wedlock. If any one claimed an inheritance as heir, and it was objected that he was not heir, because he was not born in lawful wedlock; then the plea ceased in the king's court, and it was commanded to the archbishop or bishop, whichsoever

Of bastardy.

[d] Glanv. lib. 7. c. 12.

[e] Ibid.

[f] In German *bastard*; from *bast*, says Spelman, which signifies *instratus*, and metaphorically *spurius*, *impurus*; and *hart*, which signifies *ortus*, or *editus*. So we say in English *upstart*; as it were, *subito exortus*. Vid. Spelm. voce Bastardus.

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it might be, to make enquiry of the marriage, and to signify to the king, or his justices, his judgment thereon; for which purpose there issued a writ to the following effect: *Rex episcopo salutem: Veniens coram me W. in curiâ meâ petit versus R. fratrem suum quartam partem fœdi unius militis in villâ, &c. sicut jus suum; et in quo idem R. jus non habet, ut W. dicit, eò quòd ipse bastardus sit, natus ante matrimonium matris ipsorum. Et quoniam ad curiam meam non spectat agnoscere de bastardiâ, eos ad vos mitto, mandans ut in curiâ christianitatis inde faciatis quod ad vos spectat. Et cùm loquela illa debitum coram vobis finem sortita fuerit, mihi literis vestris significetis, quid inde coram vobis actum fuerit, &c.*[g].

Upon the subject of legitimacy, there was this curious question: If a person was born before his father married his mother, whether, after the marriage, such child was to be considered as a lawful heir? And Glanville says, that tho' by the canons and Roman law (meaning a law of Justinian adopted in a constitution made in the time of Pope Alexander III. about thirty years before) such a child was a lawful heir; yet by the law and custom of this realm he was not to be received as an heir, to hold or claim any inheritance. The question, whether born before or after marriage, we have seen, was examined before the ecclesiastical judge, whose judgment was to be reported to the king or his justices; but when the spiritual judge had certified the answer to that question, the king's court made use of it as it pleased, and denied or adjudged the inheritance in dispute to either party, according to its own rule of determination: so that the ecclesiastical court only answered whether the party was born before or after marriage; the king's court determined *who* was heir[h].

As a bastard could have no heir but of his body, this gave occasion to a very particular question of inheritance and succession. If a person made a gift of land to a bastard,

[g] Glanv. lib. 7. c. 13, 14. [h] Ibid. c. 15.

reserving

reſerving a ſervice or any thing elſe, and received homage, and the baſtard died in ſeiſin of the land, without leaving any heir of his body, it was a doubt in Glanville's time, who was to ſucceed to the land; it being clearly held that the lord could not; though it was determined, that if a baſtard died without a will, his goods went to his lord; and if he held of more than one, each was to take that which was found within his fee [i].

Uſurers.

It may be remarked here, that all the effects of an uſurer, whether he made a will or not, belonged to the king: this was meant as a penalty upon uſury, after the death of the party; for in his life-time he could not be proceeded againſt criminally. Among other inquiſitions which uſed to be made for the king, one uſed to be made of a perſon dying in this offence (for ſo it was called) by twelve lawful men of the vicinage, upon their oaths: and if it was proved, all the moveables and chattels of the deceaſed uſurer were taken for the king's uſe; his heir was diſinherited; and the land reverted to the lord. If a perſon had been notoriouſly guilty of uſury, but had deſiſted from the practice, and died a penitent, his property was not to be treated as the property of an uſurer. The point therefore was, whether a man *died* an uſurer; and only in ſuch caſe could his effects be confiſcated [k].

Of eſcheat.

To finiſh the ſubject of deſcent to heirs; it muſt be remarked, that next after thoſe we have mentioned, the *ultimus hæres*, if he could be ſo called, of every man was his lord: for when a perſon died without a certain heir [l], the

[i] Glan. lib. 7. 16.

[k] Ibid.

[l] This law of *ultimus hæres*, laid down ſo generally by Glanville, is ſaid by himſelf, juſt before, not to take place where a baſtard died without heirs of his body. The reaſon of this exception to the analogy of tenures does not appear. In caſes of forfeiture where the goods even went to the king, yet the land eſcheated to the lord. We ſhall ſee, that in the time of Bracton, the land, in this caſe of baſtardy, eſcheated to the lord, and ſo it does at this day.

It is worthy of remark, that in Scotland, where feudal rights were in general more regarded than in England, the lord has long been deprived of this caſualty, and the king is conſidered as the *ultimus hæres* not only of the baſtard, but in all caſes of failure of heirs; upon the principle, *quod nullius eſt, cedit domino regi*. 2. Blackſt. 249. Erſk. Prin. b. 3 tit. 10.

lord

lord of the fee might, of right, take into his hands and retain the fee, whether ſuch lord was the king or any other perſon. Nevertheleſs, ſhould any one afterwards come and ſay he was the right heir, he might, either by the grace of the lord, or at leaſt by the king's writ, be let in to ſue for the inheritance, and make his claim out in court; yet, in the mean time, the land remained in the lord's hands; it being a rule, that when a lord had any doubt about the true heir to his tenant, he might hold the land till that was made out in due form of law. This was like what we have ſeen was done, when there was a doubt whether an heir was of age or not; with this difference, that in this caſe the land, in the mean time, was conſidered as an eſcheat, which was to all intents and purpoſes the abſolute property of the lord; in the other, it was not looked upon as his own, but only as *de cuſtodiâ*.

LANDS reverted to the lord by eſcheat, not only on failure of heirs, but by various cauſes of *forfeiture*. If any one was convicted of felony, or confeſſed it in court, he loſt his inheritance by the law of the land, and it went to his lord as an eſcheat. Where a perſon held of the king *in capite*, in ſuch caſe, as well his land as his moveables and chattels, wherever they were found, were taken for the king's uſe. Again, if an outlaw, or one convicted of felony, held of any one but the king, then alſo all his moveables belonged to the king, and his land was to remain in the king's hands for a year; but at the expiration of that time, it was to revert to the lord of the fee: this, however, was *cum domorum ſubverſione et arborum extirpatione*, that is, according to the barbarous and unwiſe policy of thoſe days, not till the king had firſt ſubverted all the houſes, and extirpated all the trees thereon.

IN ſhort, when a judgment paſſed in court, that a man ſhould be *exhæredatus*, his inheritance reverted to the lord of the fee, as an eſcheat. If any one was condemned for theft, his moveables and chattels went to the ſheriff of the county;

county; but the lord of the fee took the land without waiting the year, as in the former case, because theft was not an offence against the king's crown, as robbery and homicide were. When any one was regularly and legally outlawed, he forfeited his lands; and tho' he was afterwards restored by the king's pardon, neither he nor his heirs could, by reason of such pardon, recover the land once forfeited, against the lord; for, notwithstanding the king remitted the pains of forfeiture and outlawry as far as regarded himself, he could not thereby infringe the rights of others [m].

It was to illustrate the title of *maritagium*, that we were at first led into this long digression about the law of descent, legitimacy, and escheat: to that we now return; and shall conclude what is to be said upon it, by speaking of the tenure by which a tenant *in maritagio* held his estate.

Maritagium. Maritagium was of two kinds: one was called *liberum*, or free; the other, *servitio obnoxium*, liable to the usual services. *Liberum maritagium* was when a freeman gave part of his land with a woman in marriage, quit and freed from him and his heirs of all services towards the chief lord. Land so given enjoyed this immunity as low down as to the third heir; and during that time no homage was to be done: but after the third heir was dead, the land became subject to its old services, and homage was again to be done for it. If land was given *in maritagium servitio obnoxium*, that is, with a reservation of the legal services; in that case, the husband of the woman and his heirs down to the third were to perform that service, but yet without doing any homage; but the third heir, says Glanville, was to do homage for the first time, and so were all his heirs for ever after; tho', in case of *liberum maritagium*, we have seen that homage was not to be done till after the third heir was dead. In all these cases, however, where no homage was done, yet a fealty was to be performed by the woman and her heirs, either by solemn promise or by

[m] Glanv. lib. 7. c. 17.

oath,

oath, almoſt in the ſame form and words in which homage was done.

When a man having land given him *in maritagium* with a woman, had by that woman an heir born, whether male or female, who was heard to cry within four walls, *clamantem et auditum infra quatuor parietes*, as they expreſſed it, and ſurvived his wife, then, whether the heir lived or not, the *maritagium* remained to the huſband during his life, and after his death reverted to the donor or his heirs: but if he had no heir of his wife, then the *maritagium* reverted to the donor or his heirs, immediately upon her death. And this was a ſort of reaſon why homage was not uſually received for theſe *maritagia*. For when land was given in any way, and homage was received for it, the effect of homage was ſuch that the land could not, by law, return to the donor or his heirs: which would be contrary to the intention of theſe gifts *in maritagium*. If the woman who had land thus given *in maritagium* had ſurvived her huſband, and married a ſecond, the law was the ſame as to his retaining the land in caſe he ſurvived, whether the firſt huſband left an heir or not [n].

If land was to be claimed either by the wife or her heir, as having been given *in maritagium*, there was a difference between ſuch a claim when againſt the donor and his heirs, and when againſt a ſtranger. If it was againſt the donor and his heirs, then it might be in the election of the demandant to ſue in the court chriſtian, or in the ſecular court. For queſtions of *maritagium* were conſidered as belonging to the eccleſiaſtical judge, if the demandant pleaſed to reſort to him, on account of the mutual promiſes made by the man and woman at the time of the eſpouſals. But if the ſuit was againſt a ſtranger, then it was to be determined in the lay court, in the ſame way as other ſuits about lay-fees. It muſt be obſerved, that ſuch a ſuit, like a plea of dower, was not to be conducted without the preſence of

[n] Glan. lib. 7. c. 18.

the

the warrantor; and as far as concerned the warrantor, every thing was to be ordered as in an action for dower; all which will be made plain when we come to speak of that proceeding: only this must be remembered, that the third heir, after he had performed his homage, might go on with the suit without the authority of his warrantor [o].

Homage.

THE subject of homage and relief deserves further consideration, and will properly enough follow what has just been said. Upon the death of the father or other ancestor, the lord of the fee was to receive the homage of the right heir whether he was of age or not, so as the heir was a male; for women could, by law, do no homage, though they sometimes used to do fealty; yet, when they married, their husbands were to do homage for them, in cases where it was due for the fee they held. If a male heir was a minor, the lord could not have custody of the fee nor of the heir till he had received homage; it being a general rule, that a lord could command no service, relief, or any thing else from the heir, whether he was of age or not, till he had received homage for the fee in respect of which he claimed such relief or service; and this was on account of the protection the heir could claim of his lord after homage, but not before. A person might do homage to different lords for different fees; but one of these was to be the chief homage, and distinguished above the rest, by being accompanied, says Glanville, with allegiance [p]; which was to be performed to that lord of whom the homager held his chief freehold.

HOMAGE was to be done in this way: the person was to profess, "that he became HOMO *domini sui*, the man of "his lord, to bear him faith for the tenement in re- "spect of which he did homage; to preserve his terrene "honour in all things, saving only the faith he owed to the "king and his heirs." From this it is clear that it would

[o] Glanv. lib. 7. c. 18. [p] *Cum ligeancia factum.*

be

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Of deeds.

be a breach of faith and of homage for a vaſſal to do any thing to the damage of the lord [q], unleſs in his own defence, or at the command of the king, when his lord had taken up arms againſt his ſovereign lord the king: and, in general, it would be a breach of faith and of homage to do any thing *ad exhæredationem domini ſui, vel dedecus corporis ſui*. If then ſeveral lords, to each of whom a tenant had done homage, ſhould make war on each other; it was the tenant's duty to obey the commands of his chief lord, and to go with him in perſon, if he required it, againſt any of the reſt; notwithſtanding which, in all other reſpects, the ſervices owing to ſuch other lords were ſtill to be duly rendered by the tenant. The penalty of doing any thing to the diſheriſon of a lord, was for the tenant and his heirs to loſe, for ever, the fee held of him: the ſame, if the tenant put violent hands upon him, to hurt or do him any atrocious injury [r].

GLANVILLE makes it a queſtion, whether a tenant could be put to anſwer in his lord's court, for default in any of the above particulars, and whether the lord could *diſtrain* him, by judgment of his court, without the command of the king or his juſtices; or without the king's writ, or that of his chief juſtice. And he thought that the law allowed a lord, by the judgment of his court, to call upon and diſtrain his homager to come to his court; and if the homager could not purge himſelf againſt the charge of his lord *tertiâ manu*, by three perſons, or as many more as the court might require, he ſhould be *in miſericordiâ domini* to the amount of the whole fee he held of him. Glanville puts another queſtion; whether a lord could diſtrain his homager to appear in his court to anſwer for the ſervice of which the lord complained he deforced him, or made default in payment; and he thought that the lord might, without the command of the king or his juſtices;

[q] *Dominum ſuum inſidiare.* [r] Glanv. lib. 9. c. 1.

and

and that in such a proceeding the lord and his homager might come to the duel, or the great assise, by means of any one of the *pares* who chose to make himself a witness that he had seen the tenant or his ancestors do to the lord and his ancestors the service in dispute, which he was ready to *deraign* or prove; and that if the tenant was in this manner convicted, judgment should be for him to lose the whole fee which he held of the lord. Where a lord found he could not in this manner *justitiare*, or compel his tenant to appear in his court, he was obliged to resort to the process of the *curia regis* [s]; that is, to the command or writ of the king, or his justices.

Homage might be done by every freeman, as well those within age as those who were of full age, whether clergy or lay. Yet bishops consecrated could not do homage to the king, though they held their bishoprics as baronies, but only fealty; and this they performed with an oath. It was usual for bishops elect, to do homage before their consecration [t].

It is to be understood, that homage was not a mere personal thing. It was done in respect of some benefit derived from property or possession. It was due in respect of lands, tenements, services, rents in certain, whether in money or other things; but without some of these causes no homage was due to a lord, though it might be due to the king. Again, homage was not due in respect of all lands; for it was not due on account of dower, nor free marriage, nor from the eldest sister on account of the fees of younger sisters, till after the third descent; nor of a fee given in free alms [u].

Homage might be received by any free man or woman, whether of age or not, as well clergy as lay. If homage had been done to a woman, and she married, it was to be done over again to the husband; yet, in a case somewhat similar, namely, when a person, by a final concord made

[s] Glanv. lib. 9. c. 1. [t] Ibid. [u] Ibid. c. 2.

in

in court, recovered land for which a relief had been paid to the chief lord, it was a queſtion, whether the perſon recovering was bound to pay a relief, upon his coming into poſſeſſion thereof[x].

In conſequence of homage being performed, there aroſe a mutual relation between the parties; according to the rule, *quantum homo debet domino ex homagio, tantum illi debet dominus ex dominio; præter ſolam reverentiam.* Therefore, when land was given for the ſervice and homage of the tenant, and any one afterwards inſtituted a ſuit for that land, the lord was bound to warrant it to him, or to give him in lieu thereof *competens excambium*, an equivalent in value.

Relief.

When an heir who had been in cuſtody came of age, the inheritance was reſtored to him without paying a relief; that being remitted in conſideration of the profit the lord had derived from the cuſtody. A female heir, whether of age or not, was continued in cuſtody till ſhe was married by the advice of her lord. If ſhe had been within age when ſhe firſt came into the lord's cuſtody, then upon her marriage the inheritance was quit of all relief; but if ſhe was of age when ſhe firſt came into the lord's cuſtody, though ſhe continued ſome time in cuſtody before marriage, yet her huſband was to pay a relief upon the marriage; and a relief once paid by the huſband, was an acquittal both to huſband and wife, during their ſeveral lives, for any relief on account of the inheritance: ſo that neither the wife nor her ſecond huſband, if ſhe had one, nor the firſt huſband, ſhould he ſurvive her, could be called upon to pay any relief[y].

If the male heir was of age when his anceſtor died, and was well known to be the heir, he might hold himſelf in the inheritance even againſt the will of the lord, as we before ſaid; provided he made a tender of his homage, and a reaſonable relief, in the preſence of credible perſons. The

[x] Glanv. lib. 9. c. 3. [y] Ibid. c. 4.

relief

relief of one knight's fee, according to the cuſtom of the realm, was ſaid to be reaſonable at a hundred ſhillings. The relief in ſoccage-tenure was one year's value of the land. As to baronies, nothing certain was fixed concerning their relief; but the relief they were to pay was meaſured by the pleaſure and mercy of the king alone, to whom it was due. The law was the ſame in ſerjeanties[z].

Aids.

WHEN the lord and the heir had come to an agreement reſpecting what was to be paid for relief, the heir might exact reaſonable aids from *his* homagers; always proportioning this demand to their circumſtances, and the ſize of their fees; that it might not become ſuch a grievous impoſition as would intirely deſtroy their *contenement*, or, to uſe an Engliſh term which has been formed from it, their *countenance*, and appearance in the world: and no other meaſure was ſettled for aſcertaining theſe aids but this regard to facts and circumſtances. With the above precautions, a lord, in other caſes, might exact ſimilar aids of his tenants; as when he made his ſon and heir a knight, or when he married his eldeſt daughter. Glanville made a queſtion, whether lords could demand theſe aids of their tenants to enable them to carry on their wars? The practice, at leaſt, was for them never to attempt to diſtrain for aids on this occaſion, but to leave them to the voluntary generoſity of their tenants. For the other aids, ſo long as they were reaſonable, lords might, by judgment of their courts, without the *precept* or command of the king or his chief juſtice, diſtrain their tenants by the chattels that were to be found on their fees, or, if need were, by the fees themſelves; ſo, however, that the proceeding was had regularly by the judgment of the court, and conſiſtent with the reaſonable cuſtom thereof. If a lord could diſtrain his tenants for payment of theſe reaſonable aids, much more, ſays Glanville, might he make diſtreſs for payment of his relief, and for ſuch ſervice as was due to him on

[z] Glanv. lib. 9. c. 4.

account

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account of the fee[a]. Thus we see the remedy by distress had, in Glanville's time, become a process first against the chattels; and only *si opus fuerit*, was there recourse to the fee itself; though it is probable, that in the origin of this summary method of compelling tenants to do their services, it was usual to take the whole fee into the lord's hands as a forfeiture, to enable him to do that justice to himself which his tenant refused; but this rigorous proceeding was by degrees softened down to one against the moveables; and only in default of them, against the land.

Administration of justice.

HAVING taken this view of the nature of tenures and estates, it seems necessary to consider the order of administering justice, with the process and modes of proceeding in obtaining redress for any injury to property or to the person; an enquiry not less interesting than the former, as it contains in it the first outline of that course of judicature which prevails, with considerable alterations indeed, at this day. In pursuing this, there will be occasion to notice such parts of the law concerning private rights as have not already been mentioned.

PLEAS were divided into *civil* and *criminal*. Criminal pleas were again divided into such as belonged *ad coronam domini regis*, and such as were within the jurisdiction of the sheriff. The pleas belonging to the king's crown were, the *crimen læsæ majestatis*, as the death of the king, or any sedition touching his person or the realm; pleas concerning the fraudulent concealment of treasure trove; pleas *de pace domini regis infractâ;* pleas of homicide, burning, robbery, rape, and the *crimen falsi;* all which offences were punished with death, or the loss of limbs. Only the crime of theft was excepted, which was within the cognizance of the sheriff, and determinable in the county court. The sheriff, in like manner, in cases where the lord of a franchise neglected to do justice, had cognizance of *medletæ*, as they were then called, *verbera*, and *plagæ;* unless the party com-

[a] Glanv. c. 8.

plaining

plaining added, as he might if he pleaſed, an allegation, *de pace domini regis infractâ*, namely, that it was againſt the king's peace [b].

CIVIL pleas were divided in the ſame way; ſome being entertained in the king's court, and others in that of the ſheriff. In the king's court were determined pleas concerning baronies; that is, manors held of the king *in capite*; pleas concerning advowſons, villenage, dower *unde nihil*; complaints for breach of final concords made in the king's court; queſtions of homage, reliefs, and purpreſtures; pleas of debt owing by lay perſons, or, as they were called, *placita de debitis laicorum* [c].

THE following civil pleas belonged to the ſheriff's court: pleas of right to freehold, when the court of the lord of whom the land was held, had made default in determining the right; and queſtions upon villenage; and theſe pleas were always commenced by the king's writ.

BESIDES theſe, which were all *de proprietate*, there were other pleas *ſuper poſſeſſione*, which were decided by recognition of jurors. Of all theſe we ſhall ſpeak in their order.

FIRST, of pleas in the king's court, or *curia regis*, as it was then called. When any one, ſays Glanville, complained to the king or his juſtices concerning his fee or freehold, if "the matter was ſuch as was proper for that "tribunal, or ſuch as the king pleaſed ſhould be examined "there, the party had a writ of ſummons to the ſheriff, "directing him to command the wrong doer to reſtore the "land of which he had deforced the complainant; and un-"leſs he did, to ſummon him by good ſummoners to ap-

[b] In this diſtinction between the ſheriff's juriſdiction and that of the king, we ſee the reaſon of the allegation in modern indictments and writs, *vi et armis* of "the king's crown "and dignity," "the king's peace," and "the peace;" this laſt expreſſion being ſufficient, after "the peace *of* "*the ſheriff*" had ceaſed to be diſtinguiſhed as a ſeparate juriſdiction. Glanville, lib. 1. c. 1, 2.

[c] Glanv. lib. 1. c. 3.



*Miſpaged from 113 to 128.

A writ of right.

" pear before the king or his juſtices, at ſuch a day, to " ſhew wherefore he refuſed ſo to do." The following was the form of the writ: *Rex vicecomiti ſalutem: Præcipe A. quòd ſine dilatione reddat B. unam hidam terræ in villâ* (naming it) *unde idem B. queritur, quòd prædictus A. ei deforceat: et niſi fecerit, ſummone eum per bonos ſummonitores, quòd ſit ibi coram me vel juſtitiariis meis in craſtino poſt octabas clauſi Paſchæ apud* (naming the place where the court ſat) *oſtenſurus quare non fecerit, et habeas ibi ſummonitores, et hoc breve. Teſte Ranulpho de Glanvilla apud Clarendon* [d].

At the appointed day the party ſummoned either came or not, or ſent a meſſenger to *eſſoin* [e] him, that is, to make *an excuſe* for his not coming. If he neither came, nor ſent an eſſoin, the demandant was to appear in court, and wait his adverſary for three days. If he did not appear at the fourth day, and the ſummoners offered to prove they had duly ſummoned him, another writ of ſummons iſſued, appointing his appearance in fifteen days at leaſt; and this writ required him, as well to anſwer upon the merits of the complaint, as for his contempt in diſobeying the firſt ſummons. When three writs in this form had iſſued, and he neither appeared nor ſent any one to eſſoin him, his land was taken into the king's hands, and ſo it remained for fifteen days; and if he did not appear within that time, the ſeiſin of it was adjudged to the complainant, nor could the owner have any remedy to recover it, but by writ of right: yet if he appeared within thoſe fifteen days, and was willing to *replevy* the land, he was commanded to come again on the fourth day, and right ſhould be done; when, if he appeared, the ſeiſin was reſtored. Indeed, if he had appeared at the third ſummons, and acknowledged all the

[d] Glanv. lib. 1. c. 6.

[e] *Eſſonium*, or *Exonium*, ſays Spelman: *ex* privativum, et *ſoing*, cura; ab anguſtiâ, curâ, vel labore liberare; which is a more probable derivation, than εξομνυσθαι; though it ſhould ſignify to excuſe by means of an oath; which, to be ſure, is the preciſe nature of an eſſoin. Vid. Spelm. voce Eſſoniare.

former

former ſummonſes, he would loſe the ſeiſin of his land, unleſs he could produce a writ from the king to the juſtices, declaring he had been in the king's ſervice at the time appointed by the court, and commanding that he ſhould not be held as a defaulter, nor ſuffer as ſuch [f].

If the party denied that he was ſummoned, he was to ſwear it *duodecimâ manu;* and at the appointed day, ſhould any of the jurors who were to ſwear it, fail, or any be lawfully excepted to, and no other put in his place, that very inſtant the defendant loſt the ſeiſin of his land, as a defaulter. If he diſproved the ſummons in the above way, he was, the ſame day, to anſwer to the action.

Eſſoins.

Thus far of appearance and non-appearance: next as to *eſſoins*. If the party did not appear at the firſt ſummons, but ſent a reaſonable eſſoin, it would be received: and he might, in like manner, eſſoin himſelf three times ſucceſſively. The cauſes of excuſe, called eſſoins, allowed in the king's court, were many. The principal eſſoin was that *de infirmitate*. This was of two kinds: one was, *de infirmitate veniendi;* the other, *de infirmitate reſeantiſæ;* of which the firſt was called afterwards, *de malo veniendi;* the latter, *de malo lecti*.

If at the firſt ſummons the eſſoin *de infirmitate veniendi* was caſt, it was in the election of the complainant upon his appearing in court, to demand from the *eſſoniator*, or perſon who made it, a lawful proof of the eſſoin, on the very day; or that he ſhould find pledges [g]; or make a ſolemn engagement to bring a warrant or proof of the eſſoin, that is, the principal ſummoned, at a day appointed. And in this manner might the tenant be eſſoined three times ſucceſſively. If he did not come at the third day, nor ſend an eſſoin, the court awarded, that he ſhould appear on another day, in perſon, or by a ſufficient attorney (or *reſponſalis*, as he was then called), who would be received *ad lucran-*

[f] Glanv. lib. 1. c. 7, 8.

[g] Glanville's words are, *vel plegium inveniet, vel fidem dabit.*

*dum vel perdendum* in his place. If the party ſummoned appeared on the fourth day, after three eſſoins, and avowed them all, he was required to prove the truth of them by his own oath and that of another, and on the ſame day was to anſwer to the action: and if he did not appear at the fourth day, nor ſend his attorney, his land was taken into the king's hands, as before mentioned. There iſſued alſo an attachment againſt the eſſoniators *tanquam falſarios*, for not performing the engagement they had made for their principal; and in the mean time the principal was ſummoned, to ſhew cauſe why he did not avow and make good what his eſſoniator had engaged for in his name: a ſummons went alſo againſt the pledge put in, as above mentioned, by the eſſoniator, to ſhew cauſe why he did not produce the principal to make good the eſſoin [h].

If the principal appeared within the fifteen days, and was willing to replevy the land, a day was given him; and if he then gave his ſureties, he recovered his ſeiſin. If he denied all the ſummonſes, and diſproved them *duodecimâ manu*; or if he admitted the firſt, avowed his three eſſoins, and on the fourth day produced the above-mentioned writ, teſtifying that he was in the king's ſervice; he could in that caſe recover ſeiſin of the land: but if he did not appear within the fifteen days, the ſeiſin was adjudged to the complainant, as before mentioned. The direction in the writ to the ſheriff for taking the land in the caſe of the king was, *capias in manum meam*; and of that for giving poſſeſſion of it to the complainant was, *ſeiſias M. de tantâ terrâ*, &c.

In the ſame manner a man might eſſoin himſelf three times *de infirmitate reſeantiſæ*, or *de malo lecti*; and if the party appeared not at the third ſummons, the judgment of the court was, that it be ſeen whether the infirmity be a *languor*, or not. For this purpoſe a writ iſſued, commanding the ſheriff to ſend four lawful men of his county

[h] Glanv. lib. 1. c. 12, 13, 14, 15,

to

to view the party: and if they saw that it was *languor*, they were to appoint him to appear, or send his attorney, in a year and a day; but if they thought it not to be a *languor*, they were to appoint a certain day of appearance for him or his attorney, at which time the four viewers were likewise to appear and testify their view. Two essoniators were necessary to make this essoin [i].

Perhaps the first two essoins might be *veniendi*, and the third *de reseantisâ*; in which case, persons were to be sent to view whether *languor* or not: but if the first two were *de reseantisâ*, and the third *veniendi*, they were adjudged as if all were *veniendi*: for it was a rule, always to judge according to the nature of the last essoin [k].

We have seen that the land of a person who did not appear, was taken into the king's hands. It was also the practice, if a person had appeared and answered, and a future day was given, and at that day he neither came nor sent his attorney, that his land should be taken into the king's hands; but Glanville states this material difference, that he could not in this case replevy it; he was also summoned to hear the judgment of the court upon his default: however, whether he appeared or not, he lost his seisin for the first default, unless he could avoid the summons by the before-mentioned writ *de servitio regis*. A person who had answered in court and departed in a lawful way, might recur to the three essoins, unless there was any agreement to waive them.

If a person had essoined himself once, and at the second day he neither came nor essoined himself, we have seen that a writ issued to the sheriff to attach the essoniator *tanquam falsarium*, as before mentioned [l]. That the essoniator might be treated with a reasonable fairness, he also was allowed to essoin himself. Thus, if any obstacle happened to retard him in going to essoin his principal, so that

[i] Glanv. lib. 1. c. 18, 19. [k] Ibid. c. 20. [l] Ibid. c. 20, 21.

he

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he could not get to the court at the appointed day, he had till the fourth day, as his principal had; and if any one came within that time to eſſoin him, he was received in like manner as the eſſoniator of the principal [m]. The principal might alſo, if he pleaſed, ſend a ſecond eſſoniator, who was to ſtate to the court the excuſe of the principal, that he ſent that excuſe by an eſſoniator who was detained by accidents on the road, and that he would prove this as the court ſhould award [n]. In all caſes of eſſoins, if the adverſe party had departed, upon a day having been given by the eſſoniator, the appearance of the principal within the the fourth day ſignified nothing: for the day given by the eſſoniator muſt ſtill be obſerved [o].

THUS far of the eſſoins *de infirmitate veniendi*, and *de infirmitate reſeantiſæ;* or, as they have ſince been called, *de malo veniendi*, and *de malo lecti*. Glanville mentions ſeveral others; as that *de ultra mare;* upon which the party had at leaſt forty days. Another was, *ſubita aquarum inundatio*, or the like unexpected accident, which was allowed to ſave the four days [p]. Another was called *per ſervitium regis;* and in that caſe the plea was put without a day, till the party returned from the ſervice he was on: wherefore this was never allowed to thoſe who were conſtantly in the ſervice of the king, ſuch perſons being left to the ordinary courſe of the court. This eſſoin *de ſervitio regis* lay only for perſons in the king's ſervice before the plea was commenced. If any went into the king's ſervice after the plea commenced and eſſoined himſelf, there was this difference, whether he was there *per mandatum regis ex neceſſitate*, or *ex voluntate*, without any mandate. In the former caſe, the above-mentioned order was obſerved, and the plea was put *ſine die:* in the latter, it was not. Another diſtinction was made, whether the ſervice was *ultra mare*, or *citra mare:* if the former, he had the uſual forty days, and

[m] Glanv. lib. 1. c. 21, 22. [n] Ibid. c. 23. [o] Ibid. c. 24. [p] Ibid. c. 25, 26.

was

was expected at the expiration of them to appear and shew the king's writ, as we have before seen: in the latter, it was at the discretion of the justices to give a less or a greater time, as they thought it best suited the king's service [q].

THERE was an essoin *per infirmitatem*, which infirmity must be such as had happened since the party arrived in the town where the court was. In this case the court ordered, that he should appear the next day, and so on for three days successively; and if he made the same excuse the third day, then four knights were directed by the court to attend and see whether he was able to make his appearance or not: if not, and they testified the same in court, he had a respite for, at least, fifteen days [r].

ANOTHER essoin was *de esse in peregrinatione*. There was a distinction in this case, as in that of the king's service, whether the party had commenced his journey before the suit, or since. If he had been summoned first, the proceeding took its course, as before stated: if not, then there was a difference, whether his journey was towards Jerusalem, or otherways. In the former case, he had a respite of a year and a day, at least; in other cases, the respite lay in the discretion of the justices [s].

Of summons.

HAVING considered the circumstances relating to the tenant's appearance in court, let us pause a while, and look back to the nature of the writ which was to compel this appearance, and the method taken for its execution. The writ of summons had in it this clause addressed to the sheriff, "*et habeas ibi summonitores, et hoc breve:*" in consequence of which the first inquiry, when the demandant offered himself at the appointed day in court, was, whether the sheriff had there the writ and the summoners. If he had, and the summons was proved, they proceeded as before mentioned; but if the sheriff did not appear within the fourth day, (which was allowed also to the tenant) then

[q] Glanv. lib. 1. c. 27. [r] Ibid. c. 28. [s] Ibid. c. 29.

there

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there iſſued a writ *de ſecundâ ſummonitione*, directing him to ſummon the tenant, and to appear himſelf and ſhew cauſe why he did not ſummon him upon the firſt writ. This contained the firſt writ of ſummons, with the addition of this clauſe: *et tu ipſe ſis ibi oſtenſurus quare illam ſummonitionem ei non feceris, ſicut tibi præceptum fuit per aliud breve meum, et habeas ibi hoc breve, et illud aliud breve.* If the ſheriff came at the day, and confeſſed that he had not executed the writ, he was then, as they termed it, *in miſericordiâ regis*, that is, he was amerced; the demandant loſt a day without effect, and the tenant was to be ſummoned again: but if the ſheriff averred that he commanded lawful ſummoners to make the firſt ſummons, and they, being preſent, admitted it, they as well as the ſheriff were amerced, if they had not obeyed it. But if they denied that the ſheriff gave them charge of the ſummons, then there was a diſtinction, whether the ſheriff gave it in the county-court or not. Such matters ought, properly, to be tranſacted in that court; and if the plea was commenced ſome time before the county-court, Glanville ſays, *attachiabitur uſque ad comitatum*, and then a complete ſummons was to be made. If, then, the ſummoners had been enjoined in the county, and it was ſo proved, the ſummoners were amerced; for this was a ſolemn act, which they would not be allowed to deny: if out of the county, and they denied the command, then the ſheriff alone was amerced, for executing the writ in a private and improper manner: for all public acts, ſuch as enjoining ſummons to be made, taking pledges of proſecuting, and pledges *de ſtando ad rectum*, ought to be tranſacted in a public manner, that there might be no debate concerning ſuch prefatory proceſs; a circumſtance which would lead to great impediments in ſuits. If the ſummoners were not preſent at the appointed day, but ſent their eſſoniators, who eſſoined them; and added, that they had properly ſummoned the party; in that caſe, the firſt day was conſidered as not loſt to the demandant, and the

the ſummoners were amerced for not appearing and proving the ſummons, as was enjoined them, unleſs they could excuſe themſelves by the king's writ *de ſervitio*. It ſhould be remembered, that one or other of the ſummoners might excuſe himſelf at the firſt day; and in that caſe, the firſt day was not conſidered as loſt to the demandant[t].

Of attachments.

SUCH was the proceeding where the tenant was ſimply ſummoned, without any pledges being given. It may be proper to mention in this place, what the proceſs would be, when an *attachment* was neceſſary. If the ſuit was of a kind to make it neceſſary for the tenant to find pledges *de ſtando ad rectum* for his appearance, (as was the caſe in pleas for breach of a final concord made before the king or his juſtices, and for novel diſſeiſin) and theſe pledges had been recorded in the county court, or before the juſtices; then if the tenant did not appear, nor eſſoin himſelf, the pledges were adjudged to be amerced, and further pledges were required, to engage for his anſwering to the ſuit. This was to be done three times; and if he did not come at the third ſummons, his land was taken into the king's hands, in like manner as before mentioned; and the pledges likewiſe were amerced, and ſummoned to appear in court at a certain day, in order to hear the judgment. This was the courſe of *attachment* in civil cauſes: but in criminal ones, as in thoſe *pace de domini regis infractâ*, if the party did not appear at the third ſummons, there iſſued a *capias* to take the body, the pledges being amerced as in the former caſes[u].

THUS far of the default of the tenant. If the demandant did not appear at the firſt day, he might eſſoin himſelf in like manner as the tenant. If he neglected both, the tenant was diſmiſſed *ſine die*; ſo, however, as that the demandant might inſtitute another ſuit for the ſame cauſe of action. But as to this, and the conſequence of the tenant's default, there was a diverſity of opinions in Glanville's

[t] Glanv. lib. 1. c. 30, 31. [u] Ibid. c. 31.

time.

time. Some held that he only loſt his firſt writ, with his coſts and expences, but not his action; ſo that he was at liberty to commence another: others thought he loſt his action totally, without any right of recovery; and that he ſhould be amerced for his contempt of court. Others were of opinion, that he lay at the king's mercy, whether he ſhould be admitted to bring his action again. In either caſe, if the demandant had found pledges *de clamore ſuo proſequendo*, as was the caſe in ſome ſuits, his pledges were likewiſe to be amerced. Glanville further adds, that in criminal matters and thoſe relating to the peace, where the king had an intereſt, as he was bound to proſecute, his body was to be taken, and kept in cuſtody until he proſecuted his appeal: beſides which, his pledges were ſtill to be amerced[x]. If both demandant and tenant were abſent at the day, it was in the diſcretion of the king or his juſtices to proceed againſt both; againſt the tenant for contempt of court, and the demandant for falſe claim[y].

When obedience had been paid to the writs of ſummons, and both parties were in court, the demandant made his demand of the land in queſtion; and then the tenant might, if he pleaſed, pray a view of the land. If the tenant had no other land in the ſame vill, the view was made without delay; but if he had, the tenant was reſpited, and another day given in court. When he departed in this manner from court, he might claim three eſſoins; and a writ was directed to the ſheriff to ſend *liberos et legales homines* (not ſpecifying any number) of the vicinage of the vill to view the land in queſtion, and to have four of them to certify their view to the court[z].

After the three eſſoins accompanying the view, and after both parties had appeared in court; then the demandant was to ſet forth his claim in the following manner: *Peto*, &c. "I demand againſt *B.* one hide of land in ſuch "a vill (naming it), as my right and inheritance, of which

[x] Glanv. lib. 1. c. 32. [y] Ibid. 33. [z] Ibid. lib. 2. c. 1, 2.

my

" my father (or grandfather, as it might be) was seized in " his demesne as of fee, in the time of Henry I. (or after " the first coronation of the king, as it might be), and " from which he received produce to the value of fifty shil- " lings at least (as in corn, hay, and other produce); and this " I am ready to prove by this my free man John; and if any " thing should happen to him; by him, or him" (for he could name several, though only one could wage battle) " who " saw and heard this." Or he might conclude in this form: " and this I am ready to prove by this my free man John, " whom his father, on his death-bed, enjoined, by the faith " a son owes a father, that if he ever heard of any plea be- " ing moved concerning this land, he would *deraign* (or " prove) this[a], as what his father had seen and heard[b]." This was the manner in which the demandant spread out the substance of his writ; and his reliance was always upon the testimony *de visu et auditu*.

Counting upon the writ.

AFTER the demandant had thus made his claim, it was in the election of the tenant, whether he would defend himself by *duel*, or avail himself of the privilege granted by the king's late statute, and demand that a *recognition* should be made, which of the two had the greatest right to the land. If he chose the duel, he was to defend his right *de verbo in verbum*, as the demandant had set it forth; either in person, or by some fit champion. It was a rule, that when the duel was once waged, the tenant could not claim the benefit of the new law.

The duel.

AFTER the duel was waged, the tenant might essoin himself three times, as for himself; and in addition to these, three times in respect of his champion. When all these essoins were elapsed, the demandant was to bring his champion into court, ready for the engagement: the champion was to be the same person, upon whom he put the proof in his claim: nor could he put any one in his

[a] Glanville's words are: *Hoc dirationare, sicut id quod pater suus vidit, et audivit.*

[b] Glan. lib. 2. c. 3.

place

place after the duel was once waged. If he who waged the duel happened to die, and that was declared by the voice of the vicinage, he might recur to one of the others named in the claim; or even a ſtranger, if that ſtranger was qualified to be a proper witneſs; for that qualification was always required in the champion of the demandant. But this was only where the champion died by a natural death; for if it happened by any fault or neglect of his own, no other could be ſubſtituted in his place, and the demandant loſt his ſuit. Glanville ſtates it as a queſtion, whether the demandant's champion himſelf could nominate any one in his place; and he thought, that by the old and eſtabliſhed cuſtom of the realm, he could not appoint any one, except his ſon born in lawful wedlock.

As we before ſaid, the champion of the demandant muſt be a perſon who could be a proper witneſs of the matter in queſtion *per viſum et auditum;* the demandant of conſequence could not be his own champion; but the tenant might defend himſelf, either *in perſon*, or by another fit champion. If the champion of the tenant died, it was a queſtion what was to be done; whether the tenant might defend himſelf by ſome other, or was to loſe his ſuit, or only ſeiſin of the land: Glanville thought it was to be ordered exactly as in caſe of the demandant's champion dying.

It ſometimes happened, that the champion was a perſon hired for a reward. This was a good cauſe of exception; and if the adverſe party offered to prove it by one who ſaw the reward given, he was to be heard to this point; and the duel, in the mean time, was deferred. If the champion of the demandant was convicted of this charge, or was vanquiſhed in the duel upon the point of right, the demandant loſt his ſuit, and the champion loſt his *legem terræ;* that is, he was never after to be received as a witneſs to wage duel for any one; though he might in a cauſe of his own, either as defendant or appellant, in matters of the

the peace and of perſonal injury; he might alſo defend by duel his own right to a fee and inheritance. In addition to the loſs of his law, he was to be fined in the penalty of ſixty ſhillings, *nomine recreantiſæ*, on account of his cowardice. If the champion of the tenant was conquered, his principal loſt the land in queſtion, with all the fruits and produce found on it at the time of the ſeiſin, and was never to be heard in a court of juſtice concerning the ſame; for it was a rule, that whatever was once determined in court by duel, remained ever after fixed and unalterable. There, accordingly, iſſued a writ to the ſheriff, *quòd ſine dilatione ſeiſias M. de unâ hidâ terræ, &c.—quia ea hida terræ adjudicata eſt in curiâ meâ per fidem duelli.* When the champion of the demandant was conquered, as before mentioned, the tenant was quit-claimed[c] from any right of the demandant to recover againſt him.

This was the courſe of proceeding, when the tenant, in a writ of right, choſe to defend his right by duel[d]. But the tenant might avail himſelf of the proviſion lately made by Henry II. and put himſelf upon the aſſiſe; to which the demandant might conſent, and put himſelf alſo upon the aſſiſe.

Of the aſſiſe.

If the demandant had expreſſed before the juſtices in open court[e] his conſent to put himſelf on the aſſiſe, he was not allowed to retract, but muſt ſtand or fall by the aſſiſe, unleſs he could ſhew ſome good cauſe why the aſſiſe ſhould not paſs between them. One cauſe which might be ſhewn, was, that they were of the ſame blood, and deſcended from the ſame ſtock whence the inheritance came. If this was admitted by the other party, the aſſiſe was waived, and the queſtion was argued and determined by the court; it being a point of law, which was

[c] *Quietus clamabatur de ejus clameo.*

[d] Glanv. lib. 2. c. 4, 5.

[e] So I conſtrue *coram juſtitiis in banco ſedentibus*, tho' this phraſe has been quoted by ſome perſons to ſhew that in the time of Glanville, there were juſtices *de banco*, in the modern ſenſe of thoſe words; a conſtruction which this paſſage will certainly not warrant.

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the nearest to the first stock, and the heir with the better title. In this manner the nearest heir obtained the land, unless it could be shewn that he or his ancestor had any way lost it, sold it, made a gift of it, changed it, or by any other means had parted with it; and if the cause was rested upon any of these points of fact, it might be determined, says Glanville, by the duel.

SUPPOSE the person who had put himself on the assise, had denied this impediment of relationship; such a question was tried by calling into court the common relations of both parties. If these agreed unanimously that they were related, it was usual to abide by this declaration; but if one of the litigants still continued to deny it to be so, the last resort was to the vicinage; and if they agreed with the relations, this complete testimony was acquiesced in. Should the relations differ in their testimony, the vicinage was in like manner called in, and their verdict was decisive. If, upon this inquisition being made, it appeared to the court and justices that the parties were not descended from the same stock, the person who made the exception was to lose his suit. If there was no exception taken, then the assise proceeded, and its determination was as final as that by duel[f].

BEFORE we enter on the proceeding of the assise, let us reflect with Glanville upon the nature and design of this innovation upon the old method of trial. "The assise," says that author[g], "is a royal benefit conferred on the na-

[f] Glanv. lib. 2. c. 6.

[g] The words of Glanville are: *Est autem assisa regale quoddam beneficium clementiâ principis, de concilio procerum populis indultum.* I quote this from the last edition of Glanville, adhering to the reading which is warranted by the consent of the *Harleian*, *Cottonian*, and *Bodleian* manuscripts, in opposition to the old printed text, which reads *magna assisa*, &c. an epithet which, I am clear, has been interpolated in this and other passages of Glanville by a later hand at a period when the distinction between the *great assise* and other assises had grown familiar among lawyers. This corruption of the text in so remarkable a passage as the present, has had the effect of establishing a vulgar opinion, that the alteration made by Henry II. related only to the trial in the writ of right; an opinion which is not warranted by the history of this revolution, and which is left without any support, as it should seem, when the concurring testimony of these three MSS. is against the insertion of this epithet in most of the places where it is used.

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" tion by the prince in his clemency, by the advice of his " nobles, as an expedient whereby the lives and intereſts of " his ſubjects might be preſerved, and their property and " rights enjoyed, without being any longer obliged to " ſubmit to the doubtful chance of the duel. After this " (continues he) the calamity of a violent death, which " ſometimes happened to champions, might be avoided, " as well as that perpetual infamy and diſgrace attendant " upon the vanquiſhed, when he had once pronounced " the *infeſtum et inverecundum verbum*." The horrible word here alluded to was *craven*; by which the champion ſignified that he yielded, and ſubmitted himſelf to all the conſequences attending ſuch a defeat. " This legal inſti- " tution, ſays Glanville, is founded in the greateſt equity, " and the fulleſt deſire of doing juſtice. For a queſtion " of right, which, after many and long delays, can hardly " ever be made out by duel, is inveſtigated with diſpatch " and eaſe, by the benefit of this conſtitution. The " aſſiſe itſelf is not clogged with ſo many eſſoins as the " duel. By this the expences of the poor are ſpared, and " the labour of all is ſhortened. In fine, as the credit of " many fit witneſſes has a greater influence in judicial en- " quiries than that of one only; ſo this conſtitution con- " tains in it more juſtice than the duel. The duel pro- " ceeds upon the teſtimony of one witneſs only; this " conſtitution requires the oaths of at leaſt twelve law- " ful men [h]." Such is the manner in which Glanville ſpeaks of the inſtitution of the aſſiſe.

THE proceeding by aſſiſe was thus: The party who had put himſelf upon the aſſiſe, ſued out a writ *de pace habendâ*. This was to prohibit the lord (if the ſuit was in the lord's court) from entertaining any ſuit, in which the duel had not been already waged, between the ſame parties for the ſame land, becauſe one of the parties had put himſelf upon the king's aſſiſe, and had prayed a recognition to be made,

[h] Glanv. lib. 2. c. 7.

who

who had the moſt right[i]. Upon this, the demandant came to the court, and prayed another writ, whereby four lawful knights of the county might be directed to chuſe twelve lawful knights of the vicinage, who ſhould ſay upon their oaths, which party had moſt right to the land in queſtion. As this is the firſt proceſs for the return of jurors, of which we have any mention, it may be proper to inſert it at length. It ran in theſe words: *Rex vicecomiti ſalutem. Summone per bonos ſummonitores quatuor legales milites de vicineto de Stoke, quòd ſint ad clauſum Paſchæ coram me vel juſtitiis meis apud Weſtmonaſterium ad eligendum ſuper ſacramentum ſuum duodecim legales milites de eodem vicineto, qui melius veritatem ſciant, ad recognoſcendum ſuper ſacramentum ſuum utrûm M. aut R. majus jus habeat in unâ hidâ terræ in Stoke quam M. clamat verſus R. per breve meum, et unde R. qui tenens eſt, poſuit ſe in aſſiſam meam, et petit recognitionem fieri, quis eorum majus jus habeat in terrâ illâ, et nomina eorum inbreviari facias. Et ſummone per bonos ſummonitores R. qui terram illam tenet, quòd tunc ſit ibi auditurus illam electionem, et habeas ibi ſummonitores*, &c.

AT the day appointed the tenant might eſſoin himſelf three times; for it was a rule, that as often as either party appeared in court, and did what he was commanded by the law to do, he might again recur to his three eſſoins. But if this was allowed, the conſequence would be, that as many or more eſſoins would intervene in the proceeding by aſſiſe than by duel, which would ill agree with what we have juſt ſaid about the conciſeneſs of this new method. For ſuppoſe the tenant eſſoined himſelf three times, on the election of the twelve knights by the four; afterwards, when he appeared in court, ſome or other of the four knights might eſſoin himſelf; and then, after theſe eſſoins, the tenant might again eſſoin himſelf afreſh; ſo that the aſſiſe would hardly ever be brought to any effect: it was

[i] Glanv. lib. 2. c. 8, 9.

therefore

therefore neceſſary to defeat the operation of the above rule, in this inſtance. A conſtitution was accordingly paſſed, enabling the court to make order for removing theſe obſtacles, and expediting the proceeding; in purſuance of which, when the four knights appeared at the appointed day in court, ready to chuſe the twelve knights, they were authorized, whether the tenant appeared or not, to proceed to the election. If he had been preſent, he might make a lawful exception to any of the twelve; and therefore the court would, in his abſence, direct more than twelve to be elected, that when he appeared, he might have a greater chance to find twelve unexceptionable jurors. Jurors, ſays Glanville, might be excepted againſt in the ſame manner as witneſſes were rejected in the court chriſtian; jurors being in fact only witneſſes, and the teſtimony of witneſſes being always conſidered as a matter of canonical regulation.

So deſirous were they of avoiding delay, that upon the tenant appearing, if all the four knights did not appear, yet by the advice of the court, and aſſent of parties, one of the knights, taking two or three others of the county then in court, though not ſummoned, might proceed to elect the twelve: though, to avoid all cavil, and in order to have enough to make the election, they uſually had the caution to call ſix or more knights to court. In all ſuch points, the diſcretion of the court was ſuffered to govern the eſtabliſhed courſe of proceeding; which, ſays Glanville, the king or his juſtices might temper and accommodate to the equity of the caſe then before them[k].

When the twelve knights were elected, they were ſummoned by the following writ: *Rex vicecomiti ſalutem. Summone per bonos ſummonitores illos duodecim milites, ſcilicet, A. B. &c. quòd ſint die, &c. coram me vel juſtitiis meis ad, &c. parati ſacramento recognoſcere utrùm R. vel N. majus*

[k] Glan. lib. 2. c. 12.

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*jus habeat in unâ hidâ terræ, quam prædictus R. qui clamat versus prædictum N. et unde prædictus N. qui rem illam tenet posuit se in assisam nostram, et petiit inde recognitionem, quis eorum majus jus habeat in re petitâ; et interim terram illam, unde exigitur servitium, videant: et summone per bonos summonitores N. qui rem ipsam tenet, quòd tunc sit ibi auditurus illam recognitionem.* At the day appointed for the knights to make their recognition, no essoin could be cast by the tenant, nor was his presence necessary: as he had once put himself upon the assise, he had now nothing to say why the recognition should not proceed. It was different with regard to the demandant; for if he essoined himself, which he might do, the assise remained for that day, and another day was given: for it was a rule, that though any one might lose by his default of appearance, yet no one should gain any thing if not present in court. *Perdere potest quis propter defaltam, lucrari verò nemo potest omninò absens* [1].

THE assise being about to make their recognition, it is next to be considered how they were enabled to do it. Now, some, or all, might know the truth of the matter, or all might be ignorant of it. If none of them knew any thing of the matter, and they testified the same in court, upon their oaths; the court resorted to others, till they found those who did know the truth. If some were acquainted with the fact, and some not, the latter were rejected, and others called in, till twelve at least were found who could agree. Again, if some were for one of the parties, and some for the other, fresh jurors were to be added till twelve were found who agreed in opinion for one of the parties. It is to be observed, that all who were called in, were to swear that they would not speak what was false, nor knowingly be silent as to what was true; and the knowledge they were expected to have of the matter, must have been from what they themselves had seen or heard, or from de-

[1] Glan. lib. 2. c. 15, 16.

clarations

clarations of their fathers, and such evidence as claimed equal credit with that of their own ears or eyes. *Per proprium visum suum et auditum vel per verba patrum suorum, et per talia quibus fidem teneantur habere ut propriis*[m].

When the twelve knights were agreed in the truth, they then proceeded formally to recognise, whether the demandant or tenant had most right in the thing in question. If they said the tenant had most right, or said that which satisfied the king or his justices that he had most right, then the judgment of the court was, that he should go quit of the demandant for ever, so as the demandant should never be heard again in court with effect; for a suit once lawfully determined by the king's great assise, could never be stirred again on any occasion whatever. If the assise were of opinion for the demandant, and the court gave judgment accordingly, then the adversary lost the land in question, with all its fruits and profits found there at the time of the seisin [n].

Upon this there issued a writ of execution, *quòd seisias N. de unâ hidâ, &c. quia idem N. dirationavit terram illam in curiâ meâ per recognitionem, &c.* [o] reciting the mode of trial, as the before mentioned writ of seisin did the duel. We may here notice, that the duel and assise had become so co-extensive in their consequences, as for it to grow into a rule, that the duel should not be where the assise was not allowed, nor the assise where there was no duel [p]. Assises lay concerning services, land, demands of service, rights of advowson, and that not only against a stranger, but even against a lord [q].

The regal constitution by which the assise was appointed, had also ordained a punishment for jurors *temerè jurandum*, or who swore falsely. If any were proved, or confessed themselves, guilty of perjury, they were to be spoiled of all their chattels and moveables, which were forfeited to

[m] Glanv. l. b. 2. c. 17. [n] Ibid. c. 18. [o] Ibid. c. 20. [p] Ibid. c. 19. [q] Ibid. c. 13.

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the crown; but they were permitted by the clemency of the king to retain their freeholds; they were to be thrown into prison, and be there detained for a year at least; they were to lose the *legem terræ*, or, in other words, incur the brand of perpetual infamy [r].

It was a question in Glanville's time, what was to be done, if no knights could be found, of the vicinage or of the county, who knew the truth of the matter; whether the tenant was therefore to prevail, as the person in possession; or the demandant to lose his right, if he had any. Suppose, says he, two or three lawful men, or any other number less than twelve, who were witnesses of the fact, offered themselves in court *ad dirationandum*, and said and did every thing in court proper for the occasion, could they or could they not be heard [s]?

Vouching to warranty.

This was the order of proceeding, when the presence of the tenant only was necessary, and no one else was brought in to answer. There were many cases where it was requisite to call in a third person; as when the tenant declared in court, that the thing in question was not his own, but that he held it *ex commodato*, or *ex locato*, or *in vadium*, that is, in *gage* or pledge, or committed to his custody, or in some other way intrusted to him by the real owner; or if he should declare the thing was his own, but that he had some one *to warrant* it, as the person who made a gift of it, or sold it, or gave it in exchange: or should he declare in court, that the thing was not his, but belonging to another person, that person was to be summoned by some other similar writ; and so the suit was to be carried on afresh against *him*. When he appeared in court, he, in like manner, might admit the thing to be his, or not. If he said it was not his, the tenant who had said it was, *ipso facto* lost the land without recovery, and was summoned in order

[r] Glanv. lib. 2. c. 19. [s] Ibid. c. 21.

to

to hear the judgment of the court to that effect; and whether he came or not, the adverſary recovered ſeiſin.

When the tenant called a perſon for any of the above reaſons *to warrant* the land, a day was given him to have in court his warrantor; and upon this he was entitled to three eſſoins reſpecting himſelf, and three others reſpecting the perſon of his warrantor. At length the warrantor appearing in court, he either warranted the land or not. If he would enter into the warranty, the ſuit was from thence carried on with him, and every thing went under his name, in lieu of the tenant; not but that the tenant, if he had eſſoined himſelf, would be conſidered as a defaulter, if abſent. If the warrantor, being preſent in court, declined entering into the warrant, the ſuit was to be carried on between the tenant and him; and after allegations on both ſides, they might come to the duel, although, perhaps, the tenant might not be able to ſhew a charter of warranty, but could only produce a fit witneſs to deraign it. The object of all this was, to prove the warrantor to be bound to the warranty, which would make the tenant entirely ſafe; for ſhould the land be recovered from him, the warrantor, if able, was bound by law to give him an *excambium*, as they called it, or an equivalent in recompence.

As this was the effect of a warranty when proved, it often happened that a perſon called to warranty was ſhy of coming to court: at the prayer of the tenant, therefore, the court would think it adviſeable to compel him, by a writ of ſummons *ad warrantizandum* [t].

At the day appointed, this perſon, like all others who were ſummoned to appear in court, might eſſoin himſelf three times. At the third eſſoin the court would award, that at the fourth appointed day he, or ſome attorney for him, ſhould appear; but if he did not, there ſeems to have been a doubt what ſhould be done to puniſh the contempt: for if the land in queſtion was taken into the king's

[t] Glan. lib. 3. c. 1, 2, 3.

hands,

hands, this would ſeem unjuſt to the tenant, who had not been adjudged in default; and yet if it was not done, there ſeemed to be a want of juſtice to the demandant, whoſe ſuit was delayed. Indeed Glanville thought, that, notwithſtanding theſe reaſons, the law and cuſtom of the realm required the land to be taken; for no hardſhip would fall on the tenant; it being a rule, that whereſoever a perſon loſt his land through the default of his warrantor, the warrantor ſhould make him a recompenſe in value [u].

It ſometimes happened, that a tenant neglected to call in the perſon on whom he had a claim of warranty, and defended the right himſelf. In this caſe, if he loſt it, he could have no recovery againſt his warrantor. It was by ſome made a queſtion, whether, upon the ſame principle as the tenant might defend his right by duel without the aſſent and preſence of his warrantor, he might put himſelf upon the king's great aſſiſe without his aſſent and preſence; but Glanville thought that the ſame reaſon ſhould prevail in both caſes [x].

A SUIT was ſometimes impeded by the abſence of lords; as when the demandant claimed the land as belonging to the fee of one, and the tenant as belonging to the fee of another lord. In this caſe, each lord uſed to be ſummoned to appear in court, that the plea might be heard and determined in their preſence, leſt any injury might otherwiſe be done to their rights. The lords when ſummoned might eſſoin themſelves three times, as was uſual in other caſes. If the lord of the tenant had had his three eſſoins, and the court had directed him to appear, or ſend his attorney, and he made default, the judgment then was, for the tenant to anſwer and take upon him the defence: and if he prevailed, he retained the land, and for the future did his ſuit and ſervice to the king, the lord having loſt it by his default, till he appeared and did as the law required. In the ſame manner the lord of the demandant might eſſoin himſelf three

[u] Glanv. lib. 3. c. 4. [x] Ibid. c. 5.

times;

times; and if, after that, he abſented himſelf, it was Glanville's opinion, that his eſſoniators and the perſon of the demandant ſhould be attached for contempt of court, and in that manner be compelled to appear[y].

When the two lords had appeared, and the lord of the tenant ſaid that the land was in his fee, he might take upon him the defence of the ſuit, or intruſt it to the tenant; and in either caſe, ſhould they prevail, their ſeveral rights were ſecured: but if they loſt the ſuit, the lord loſt his ſervice, as well as the tenant his land, without any recovery. If the tenant's lord, being preſent in court, failed of the warranty, and the tenant maintained that he was bound to the warranty, becauſe he or his anceſtors had done ſuch and ſuch ſervice to him or his anceſtors, as lords of that fee; and he could produce thoſe who had heard and ſeen this, or a proper witneſs to deraign it, or other fit and ſufficient proof, as the court ſhould award: if the tenant could ſay this, then he and the lord might interplead with each other[z]. If the demandant's lord entered into the warranty, and they failed in the ſuit, the lord in like manner loſt his ſervice. But the fate of the demandant was different from that of the tenant, if his lord would not enter into the warranty; for he was amerced for his falſe claim[a].

Thus has the reader been conducted through the proceeding in a writ of right, with all its incidents and appendages, when proſecuted for the recovery of land. This relation has been ſomewhat long and minute; but as it contains in it, with ſome ſmall alteration, the ſcheme of proceſs and proceeding in moſt other actions, it was indiſpenſably neceſſary to trace it with ſome exactneſs. After this, the remainder of our enquiry into the courſe of judicial remedies will be more eaſy, and the matter will be more various

[y] Glanv. lib. 3. c. 6. [z] Ibid. c. 7. [a] Ibid. c. 8.

and

and entertaining. We ſhall now proceed to ſpeak of other methods of recovering property: and firſt of advowſons.

Writ of right of advowſon.

An action for the advowſon of a church might be brought either while the church was full, or when it was vacant. If the church was vacant, and any one obſtructed the perſon who thought himſelf the patron, in preſenting a clerk, and claimed the preſentation to himſelf, there was a difference to be made, whether the conteſt was for the advowſon; that is, upon the *right* of preſenting; or upon the *laſt preſentation*, that is, the *ſeiſin* of the right of preſenting. If it was upon the laſt preſentation, and the perſon claiming it ſaid, that he or ſome anceſtor of his made the laſt donation or preſentation; then, ſays Glanville, the plea is to be conducted according to the late ordinance [b] about the advowſons of churches; and an aſſiſe was ſummoned to make recognition *what patron, in time of peace, preſented the laſt deceaſed perſon to the church:* of which aſſiſe more will be ſaid, when we come to ſpeak of other recognitions. For the preſent it will be enough to remark, that he who recovered by ſuch an aſſiſe, recovered ſeiſin of the preſentation ſo as to preſent a proper perſon, with a ſaving of the demandant's claim as to the right of the advowſon.

If the right of advowſon only was demanded, the demandant muſt add ſomething as to the laſt preſentation, either that "he or one of his anceſtors had it;" or that the tenant or one of his anceſtors had it, or that ſome ſtranger had it, or that he was ignorant who had it. Whichſoever of theſe allegations it might be, if the other party claimed the laſt preſentation as his own or his anceſtor's, the recognition was, notwithſtanding, to proceed upon the right of preſenting, except only in one of the above-mentioned

[b] Perhaps Glanville here alludes to the famous ſtatute about aſſiſes; or, from the expreſſion, it ſeems more probable, a ſtatute had been ordained ſince that, which directed recognitions to be made in caſe of laſt preſentations. It is not unlikely, that the many aſſiſes which grew into uſe in the time of Henry II. were introduced at different times, according as this mode of proceeding was recommended by experience of its benefits.

caſes;

caſes; that was, where the demandant admitted that the tenant, or one of his anceſtors, had the laſt preſentation; for then, without going to the recognition, he was to preſent at leaſt one perſon. When, however, the laſt preſentation had been decided [a] by the aſſiſe, as before mentioned or in any other lawful way, and a perſon was preſented accordingly by the ſucceſsful party; then the party who was reſolved to try the right of advowſon might go on with the ſuit, and have the following writ [b]: *Rex vicecomiti ſalutem. Præcipe N. quòd juſtè et ſine dilatione dimittat R. advocationem eccleſiæ in villâ, &c. quam clamat ad ſe pertinere, et unde queritur quòd ipſe injuſtè ei deforceat: et niſi fecerit, ſummone per bonos ſummonitores eum quòd ſit die, &c. ibi coram nobis vel juſtitiis noſtris, oſtenſurus quare non fecerit, &c.* [c].

THE perſon ſummoned had the ſame eſſoins as were before mentioned in a plea of land; and if, after theſe, he did not appear at the fourth appointed day in perſon, or by attorney, Glanville thought the next proceſs was for taking into the king's hands ſeiſin of the preſentation. The ſheriff was to execute his writ of *capias in manu* in the following way: he was to go to the church, and there declare publicly, in the preſence of ſome honeſt men, that he ſeiſed the preſentation into the king's hands: the ſeiſin remained in the king's hands fifteen days, with a liberty to the tenant to replevy it within the fifteen days, as was before ſtated [d]. In ſhort, after all the eſſoins were run out, if one or both the parties abſented themſelves, the courſe was ordered as in a plea of land.

WHEN both parties appeared in court, the demandant propounded his right in theſe words: *Peto*, &c. "I de- "mand the advowſon of this church as my right, and ap- "pertaining to my inheritance, of which I (or one of my "anceſtors) was ſeiſed (in the time of Henry I. or) ſince

[a] *Diratiocinata.*
[b] Glanv. lib. 4. c. 1.
[c] Glanv. lib. 4. c. 2. Vid. ant. 114.
[d] Ibid. c. 3, 4, 5.

"the

" the coronation of the king; and being so seised, I pre-
" sented a person to that church (at one of the before-men-
" tioned times); and so presented him that he was insti-
" tuted parson according to my presentation: and if any
" one will deny this, I have here some honest men [e] who
" saw and heard it, and are ready to prove it [f], as the court
" shall award; and particularly this *A.* and this *B.*" [g].

When the claim of the demandant was thus set forth, the tenant might defend himself by the duel, or put himself upon the assise; and in both cases it would be ordered as before mentioned [h].

This was the manner of contesting a right of advowson when the church was vacant. It might also be contested when the church was full; as if the *parson*, or he who called himself parson, in the church claimed his title by one patron, and another claimed the advowson, the latter might then have the following writ against the parson: *Rex vicecomiti salutem. Summone per bonos summonitores clericum illum M. personam ecclesiæ*, &c. *quòd sit coram me vel justitiis meis apud Westmonasterium ad diem*, &c. *ostensurus quo advocato se tenet in ecclesiâ illâ, cujus advocationem miles ille M. ad se clamat pertinere. Summone etiam per bonos summonitores ipsum N. qui advocationem illi deforceat, quòd tunc sit ibi, ostensurus quare advocationem ipsam ei deforceat*, &c. [i].

If the clerk did not appear according to the summons, nor send any to essoin him; or if after the three essoins he did not come, or send his attorney; Glanville thought, that having no lay fee by which he might be distrained, the bishop (or his official, in case the see was vacant) should be commanded to distrain him, or punish his default by taking the church into his hands, or using some other lawful means of compulsion [k].

[e] *Probos homines.*
[f] *Dirationare.*
[g] Glanv. lib. 4. c. 6.
[h] Glanv. lib. 4. c. 7.
[i] Ibid. c. 8.
[k] Ibid. c. 9.

When

When the clerk appeared in court, he would, perhaps, admit the demandant to be the patron, and would say, that he was instituted upon his presentation, or that of some of his ancestors: if so, the plea went on no farther in the king's court; for if the demandant denied the presentation, he was to maintain this controversy with the clerk before the ecclesiastical judge. Perhaps the clerk said the advowson belonged to the party summoned: now such party was dealt with in this manner: If he came at none of the three summonses, nor sent any essoin; or having essoined himself, neither came nor sent his attorney at the fourth day; the advowson of the church in question was seised into the king's hand, and so it remained for fifteen days; and if he did not appear in those fifteen days, then seisin thereof was given to the demandant. In the mean time, it was a question, what was to be done with the clerk, whether he was *ipso facto* to lose his church, or not. But supposing the party summoned appeared, and disclaimed all right in the church, the suit in the king's court ceased, and the patron and clerk contested their claims in the court christian. Should the church happen to become vacant *pendente lite*, Glanville thought, if there was no question but that, the person against whom the right of advowson was demanded, had the last presentation, either in himself or his ancestors, that he should be allowed to present a clerk, at least till he had lost the seisin: consistently with which he thought, that should a vacancy happen while the advowson was in the king's hands for fifteen days, the patron did not lose that presentation. If the party summoned should say the right of advowson was his, it was tried, as we before said of land. If he prevailed, he and his clerk were freed from the claim of the demandant; if he failed, he and his heirs lost the advowson for ever[1].

When the right of advowson was in this manner determined, it became a question what was to be done with the

[1] Glanv. lib. 4. c. 9.

clerk,

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clerk, who admitted in court that he had the incumbency of the church by preſentation of the unſucceſsful party. As the king's court could proceed no further than the right of advowſon between the two patrons, the party who had now recovered the advowſon was to proceed againſt the clerk before the biſhop, or his official: yet after all, if at the time of the preſentation the perſon preſenting was believed to have been the patron, he was left in poſſeſſion of the church during his life; for in the reign of this king, at the Council at Clarendon, a ſtatute had been made concerning clerks who had enjoyed churches by the preſentation of patrons *pro tempore*, which ordained, that clerks who had violently intruded themſelves into churches during time of war, ſhould not loſe ſuch livings during their lives [m]. This proviſion ſalved the titles of many beneficed clerks at that time. Nevertheleſs, in ſuch caſe, after the incumbent's death, the preſentation returned to the lawful patron [n].

THE following points might ariſe upon what has been ſaid concerning the right of advowſon and the laſt preſentation. When a patron had recovered an advowſon by deraignment in court, and afterwards, in proceſs of time, the parſon died; it might be aſked, whether the patron againſt whom the advowſon had been recovered, could maintain an aſſiſe *de ultimâ præſentatione*; and what anſwer could, in that caſe, be given to it by the adverſe party. For ſuppoſe the perſon bringing the aſſiſe had not, but ſome of his anceſtors had had the laſt preſentation; and it was objected to him that he ought not to have a recognition, becauſe he had loſt the advowſon to the tenant in the aſſiſe, by a ſolemn judgment of the court, whether this would be a bar to the aſſiſe? It ſhould ſeem, ſays Glanville, that it would: becauſe, as he had not the laſt preſentation, he never had ſeiſin of the advowſon: but, it ſhould ſeem, ſays he, that

[m] Vid. ant. p 54, 55. [n] Glanv. lib. 4. c. 10.

he

he might well go upon the ſeiſin of his father, notwithſtanding what had been determined reſpecting the right of advowſon. And yet if a queſtion could be thus ſtarted upon the laſt preſentation, it looks like invalidating the judgment of the king's court, before given, upon the right of advowſon; for when that had been ſolemnly adjudged, it ſhould hardly ſeem that he ought by law to recover any ſeiſin, particularly as againſt him who had before recovered the advowſon, unleſs ſome new cauſe had ariſen which would entitle him to be heard again. Indeed, if an aſſiſe was ſummoned for that purpoſe, it would be barred by this anſwer to it: that the complainant or his anceſtors had, it was true, the laſt preſentation; but if he or his anceſtors had any right, they loſt it by a ſolemn judgment in court: and this being proved by the record of the court, the ſuit would be loſt, and the complainant amerced [o].

WE have juſt ſeen, that queſtions about preſentations belonged to the biſhop's court, though the right of advowſon was cognizable only in the king's court. It ſometimes happened that when one clerk ſued another clerk in the court chriſtian, they claimed a church by two different patrons. One of theſe patrons, not chuſing to have a queſtion upon his right agitated before that tribunal, might pray a writ *to prohibit* the court from proceeding, till the right of advowſon was decided in the king's court. As this is the firſt mention we have of a prohibition to the eccleſiaſtical court, it may be proper to give this writ at length. It was as follows: *Rex judicibus*, &c. *eccleſiaſticis ſalutem.* INDICAVIT *nobis R. quòd cùm J. clericus ſuus teneat eccleſiam*, &c. *in villâ*, &c. *per ſuam preſentationem, quæ de ſuâ advocatione eſt, ut dicit, N. clericus eandem petens ex advocatione M. militis, ipſum J. coram vobis in curiâ chriſtianitatis inde trahit in placitum. Si verò præfatus N. eccleſiam illam dirationaret ex advocatione prædicti M. palàm eſt quòd jam*

Of prohibition to the eccleſiaſtical court.

[o] Glanv. lib. 4. c. 11.

*dictus*

*dictus R. jacturam inde incurreret de advocatione suâ. Et quoniam lites de advocationibus ecclesiarum ad coronam et dignitatem meam pertinent, vobis prohibeo, ne in causâ illâ procedatis, donec dirationatum fuerit in curiâ meâ, ad quem illorum advocatio illius ecclesiæ pertineat, &c.* If they proceeded in the cause after this prohibition, then the judges were summoned to appear in the king's court by the following writ[p]: *Rex vicecomiti salutem. Prohibe judicibus*, &c. *ne teneant placitum in curiâ christianitatis de advocatione ecclesiæ*, &c. *unde R. advocatus illius ecclesiæ queritur quòd N. inde eum traxerit in placitum in curiâ christianitatis; quia placita de advocationibus ecclesiarum ad coronam et dignitatem meam pertinent. Et summone per bonos summonitores ipsos judices, quòd sint coram me vel justitiis meis die*, &c. *ostensuri quare placitum illud tenuerunt contra dignitatem meam in curiâ christianitatis. Summone etiam per bonos summonitores præfatum N. quòd tunc sit ibi ostensurus quare præfatum R. inde traxerit in placitum in curiâ christianitatis, &c.*

THE next action that demands our attention, is that in which questions concerning a man's condition or state were agitated; as when one claimed a person to be his villain; or when one in a state of villenage claimed to be a free man. When one claimed a man who was before in villenage, as his villain *nativus*, he had a writ *de nativis* directed to the sheriff; and so contested before the sheriff the matter with the other who was then in possession of the villain. If the question of villenage or not villenage was not moved before the sheriff, then the plea *de nativis* went on, as will be more fully shewn presently. But if the villain said he was a free man, and he gave pledges to the sheriff that he would demonstrate it, then the suit in the county court ceased, because the sheriff was not allowed to determine that point; and if the sheriff persisted in going on to hear the cause, the villain was to make his claim to

The writ *de nativis.*

[p] Glanv. lib. 4. c. 13.

the

the juſtices, and would then obtain the king's writ, as follows: *Rex vic. &c. Queſtus eſt mihi R. quòd N. trahit eum ad villenagium de ſicut ipſe eſt liber homo, ut dicit. Et ideo præcipio tibi, quòd ſi idem R. fecerit te ſecurum de clamore ſuo proſequendo, tunc* PONAS *loquelam illam coram me vel juſtitiis meis die, &c. et interim eum pacem inde habere facias: et ſummone per bonos ſummonitores prædictum N. quòd tunc ſit ibi oſtenſurus quare trahit eum ad villenagium injuſtè*, &c. It may be remarked, that this is the firſt writ of *pone* we have yet met with[q].

THE perſon who claimed the party as his villain, was alſo ſummoned by the ſame writ, and a day was fixed for him to proſecute his claim. At the day appointed, if the villain did not come nor ſend a meſſenger or eſſoin, they then proceeded as we before mentioned in pleas[r] where attachment lay. If he who claimed the party to be his villain, neither came nor ſent, the other was diſmiſſed the court *ſine die*. In the mean while, he who was claimed by both parties as his villain, was put, as Glanville expreſſes it, into *ſeiſin of his freedom*[s]; that is, as in pleas of land, a ſeiſin of the land in queſtion was given as a proceſs of contempt; ſo in this inſtance, an inchoate temporary poſſeſſion of his freedom was given to the villain, till the parties could appear in court, and the queſtion of right was fairly heard and determined.

IF both parties appeared in court, the freedom was to be made out in the following way. The perſon who claimed to be free, was to bring into court his neareſt relations, deſcended from the ſame ſtock with himſelf; and if their freedom was recogniſed and proved in court, this was conſtrued in his favour, ſo as to free him from the yoke of ſervitude. But if the free ſtate of thoſe who were produced was denied, or there was any doubt concerning it, recourſe was had to the vicinage, and according to their verdict it

[q] Glanv. lib. 5. c. 1, 2.
[r] *Per plegios attachiatis.* Vid. ant. 121.
[s] Glanv. lib. 5. c. 3.

was

was adjudged by the court. In ſhort, if there aroſe any doubt concerning the declaration of the relations, every doubt or difficulty of this kind was to be ſolved by the vicinage[t].

WHEN the freedom of the party was, by one or other of theſe ways, fairly made out, he was immediately releaſed from the claim, and was adjudged free for ever. But if he failed in his proof, or if he was proved by the adverſary to be a villain *nativus*, he was accordingly adjudged to belong to his lord, together with all his goods and chattels. There was the ſame form and courſe of proceeding in caſe of a ſuppoſed villain claiming his freedom, and a freeman being claimed as a villain. The perſon whoſe freedom was in queſtion applied for a writ, to bring the ſuit into the king's court, and then it went on as has juſt been ſtated. It muſt be remarked, that the duel was not allowed in a ſuit to prove a man free *à nativitate*[u].

Writ of right of dower.

THE next action that comes under our conſideration, is the remedy a woman had to recover her dower. On the death of the huſband, the dower, if it was a parcel of land named and ſpecified, was either vacant or not. If it was vacant, the widow, with the aſſent of the heir, might take poſſeſſion thereof, and hold herſelf in feiſin. If part of it only was vacant, ſhe might take poſſeſſion of that, and for the remainder ſhe might have her writ of right directed to her warrantor, that is, the heir of the huſband. The writ was as follows: *Rex M. ſalutem. Præcipio tibi quòd ſine dilatione plenum rectum teneas A. quæ fuit uxor E. de unâ hidâ terræ in villâ, &c. quam clamat pertinere ad rationabilem dotem ſuam, quam tenet de te in eâdem villâ per liberum ſervitium decem ſolidorum perannum pro omni ſervitio, quam N. ei deforceat. Et niſi feceris, vicecomes faciat, ne oporteat eam ampliùs inde conqueri pro defectu recti*, &c[x].

IN purſuance of this writ, the plea went on in the lord's court, till proof was made of that court's failure in doing

[t] Glanv. lib. 5. c. 4. [u] Ibid. c. 4. [x] Ibid. lib. 6. c. 4, 5.

juſtice;

juſtice; upon which it was removed to the county court, and ſo to the king's court, if it ſeemed proper to him or his chief juſtice. The writ to remove it into the king's court was a *pone*, and was as follows: *Rex vicecomiti ſalutem. Pone coram me vel juſtitiis me's die, &c. loquelam quæ eſt in comitatu tuo inter A. et N. de unâ hidâ terræ in villâ, &c. quam ipſa A. clamat verſus prædictum N. ad rationabilem dotem ſuam. Et ſummone per bones ſummonitores prædictum N. qui terram illam tenet, quòd tunc ſit ibi cum loquelâ, &c.*[y].

This plea, as well as ſome others, might be removed from the county court to the *curia regis*, for many cauſes; as well on account of doubts which might have ariſen in the county, and which they did not know how to decide upon (and on ſuch cauſe of removal both parties were to be ſummoned) as at the prayer of one of the parties; and then it was ſufficient, if only the party not removing it was ſummoned. If the ſuit was removed by the aſſent and prayer of both parties, being preſent in court, then there needed no ſummons, for both of them muſt know the day appointed.

If either, or both parties were abſent at the day appointed, they proceeded as before mentioned. When both parties appeared, the widow ſet forth her claim in the following words: *Peto*, &c. "I demand that land, as appertaining "to ſuch land which was named for me in dower; of "which my huſband endowed me *ad oſtium eccleſiæ*, on "the day he eſpouſed me, as that of which he was inveſted "and ſeiſed at the time when he endowed me." To this claim the adverſe party might make various anſwers: he might deny or admit that ſhe was endowed of the land. But whatever was the anſwer given, the ſuit ought not to proceed without the widow's warrantor, that is, the heir of the huſband; he was therefore ſummoned by

[y] Glanv. lib. 6. c. 6, 7.

the following writ: *Rex vicecomiti ſalutem. Summone per bonos ſummonitores N. filium et hæredem E. quòd ſit coram me vel juſtitiis meis eâ die, &c. ad warrantizandum A. quæ fuit uxor ipſius E. patris ſui unam hidam terræ in villâ, &c. quam clamat pertinere ad rationabilem dotem ſuam de dono ipſius E. viri ſui verſus N. et unde placitum eſt inter eos in curiâ meâ ſi terram illam ei warrantizare voluerit, vel ad oſtendendum ei quare id facere non debet, &c.* If the heir did not appear nor eſſoin himſelf, and was in contempt, there was a doubt what was the preciſe way for compelling him. Some thought, he was to be diſtrained by his fee; others thought, he was to be attached by pledges [z].

If the heir, when he appeared, admitted what the widow alledged, he was bound to recover the land againſt the tenant in poſſeſſion, and deliver it to the widow; and for this purpoſe the ſuit was continued between him and the tenant. If he declined proſecuting the ſuit, he was bound to give her an equivalent in recompenſe; for in all events the widow was to be no loſer. If he denied what was alledged by the widow, the ſuit went on between him and her; and if ſhe could produce thoſe who heard and ſaw the endowment at the church-door, and was ready to deraign it againſt the heir, the matter might be decided by the duel: and if ſhe prevailed, he muſt in that caſe alſo deliver to her the land in queſtion, or a ſufficient equivalent. It was a rule, that no woman could maintain any ſuit concerning her dower without her warrantor [a].

Dower *unde nihil.*

This was the courſe for a widow to take, when ſhe was obliged to ſue for part of her dower: but when ſhe could get poſſeſſion of no part of it, and was put to ſue for the whole, the ſuit was commenced originally in the *curia regis*, and the perſon who with-held her dowry was ſummoned by the following writ, called a writ of dower *unde nihil habet: Rex vicecomiti ſalutem. Præcipe N. quòd juſte*

[z] Glanv. lib. 6. c. 8, 9, 10. [a] Ibid. c. 11.

*et*

*et ſine dilatione faciat habere, A. quæ fuit uxor E. rationabilem dotem ſuam in villa, &c. quam clamat habere de dono ipſius E. viri ſui,* UNDE NIHIL HABET, *ut dicit; et unde queritur quòd ipſe ei injuſtè deforceat: et niſi fecerit, ſummone eum per bonos ſummonitores quòd ſit die, &c. coram nobis vel juſtitiis noſtris, oſtenſurus quare non fecerit, &c.* Whoever was in poſſeſſion of the land, whether the heir, or any other perſon, the preſence of the heir, as was above laid down, was always neceſſary. If a ſtranger was in poſſeſſion, he was ſummoned by this writ, and the heir by the above writ of ſummons *ad warrantizandum* [b]. The ſuit between the heir and widow might be varied, according as the heir pleaſed. If ſhe claimed a certain aſſigned dower, he might deny any aſſignment, or deny that to be the land aſſigned. In both caſes the proceeding was as above deſcribed. If only a reaſonable dower was demanded, a third part was to be allotted her by the heir [c]. If more was aſſigned to her than a third part, a writ might be had directed to the ſheriff, commanding him to admeaſure it [d].

[b] Glanv. lib. 6. c. 14, 15, 16. [c] Ibid. c. 17. [d] Ibid. c. 17, 18.

## CHAP. IV.

## WILLIAM the CONQUEROR to JOHN.

*Of Fines—Of Records—Writ de Homagio recipiendo—Purpreſture—De Debitis Laicorum—Of Sureties—Mortgages—Debts ex empto et vendito—Of Attornies—Writ of Right in the Lord's Court—Of Writs of Juſticies—Writs of Replevin—and of Prohibition—Of Recognitions—Aſſiſa Mortis Anteceſſoris—Exceptions to the Aſſiſe—Aſſiſa Ultimæ Præſentationis—Aſſiſa Novæ Diſſeiſinæ—Of Terms and Vacations—The Criminal Law—Of Abjuration—Mode of Proſecution—Forfeiture—Homicide—Rape—Proceeding before Juſtices Itinerant—The King and Government—The Charters—The Characters of theſe Kings as Legiſlators—Laws of William the Conqueror—Of the Statutes—Domeſday Book—Glanville—Miſcellaneous Facts.*

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Of fines.

WE have hitherto been ſpeaking of compulſory methods of recovering and confirming rights; but it often happened, as Glanville expreſſes it, that pleas moved in the king's court were determined by an amicable compoſition and final concord: this was always by the conſent and licence of the king or his juſtices; and was done as well in pleas of land as other pleas. Such a concord uſed ſometimes, by the aſſent of parties, to be reduced into a writing of ſeveral parts: from one of theſe was the agreement rehearſed before the juſtices in open court; and, in the preſence of the juſtices, there was given to each party his part, exactly agreeing with the other's. The following is a ſpecimen of ſuch an inſtrument, literally tranſlated from one in the reign of Henry II. "This is a final concord "made in the court of our lord the king, at Weſtminſter, "on

" on the vigil of the bleſſed Peter the apoſtle, in the thirty-
" third year of the reign of Henry II. before Ranulph de
" Glanvillâ, juſticiary of our lord the king, and before
" H. R. W. and T. and other faithful and truſty perſons of
" our lord the king, then there preſent; between the prior
" and brethren of the hoſpital of St. Jeruſalem, and W. T.
" the ſon of Norman, and Alan his ſon, whom he appointed
" as attorney in his ſtead in the court of our lord the king,
" *ad lucrandum et perdendum* reſpecting all the land which
" the ſaid W. held, with its appurtenances, except one
" oxland and three tofts. Of all which land (except the
" ſaid oxland and three tofts), there was a plea between
" them in the court of our lord the king; to wit, that the
" ſaid W. and Alan concede and atteſt and quit-claim all
" that land from them and their heirs to the hoſpital and
" aforeſaid prior and brethren for ever, except the ſaid ox-
" land and three tofts, which remain to the ſaid W. and
" Alan, and their heirs, to be held of the ſaid hoſpital, and
" the aforeſaid prior and brethren, for ever, by the free
" ſervice of four-pence *per ann.* for all ſervice; and for
" this conceſſion and atteſtation and quit-claim, the afore-
" ſaid prior and brethren of the hoſpital have given to the
" ſaid W. and Alan an hundred ſhillings ſterling[a]."

A CONCORD or agreement of this kind was called *final*[b], becauſe *finem imponit negotio*; ſo that neither of the parties could recede from it. If one of the parties did not perform what he was thereby bound to do, and the other party complained of it; the ſheriff would be commanded to put him by ſafe pledges, ſo as that he appeared before the king's juſtices, to anſwer why he did not keep the fine; that is, if the complainant had previouſly given ſecurity to the ſheriff for proſecuting his claim. The writ was as follows: *Præcipe N. quòd juſtè et ſine dilatione teneat finem factum in curiâ meâ inter ipſum et R. de unâ hidâ terræ*

[a] Glanv. lib. 8. c. 1, 2. [b] Vid. ant. 92.

*in*

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*in villâ, &c. unde placitum fuit inter illos in curiâ meâ: et nisi fecerit, et prædictus R. fecerit te securum de clamore suo prosequendo, tunc pone eum per vadium et salvos plegios, quòd sit coram me vel justitiis meis, ostensurus die, &c. quare non fecerit, &c.* [b].

If he did not appear, nor essoin himself; or after the three essoins, if he did not appear, nor send his attorney, they were to proceed as was before shewn in case of suits prosecuted by attachments. When they both appeared in court, if both parties acknowledged the writing containing the concord; or if the concord was stated to be such by the justices before whom it was taken, and this was testified by their record; then the party who had broke it was to be in the king's mercy, and to be safely attached till he gave good security to perform the concord in future; that is, either the specific thing agreed on, if it was possible; or otherwise, in some instances, what was equivalent: for it was invariably expected of every one who had acknowledged or undertaken any thing in the king's court, in presence of him or his justices, ever after to observe such acknowledgment and undertaking. Moreover, had the final concord been made in a plea of land, then he who was convicted of breach of the fine, if tenant of the land, was *ipso facto* to lose the land. If one or both the parties denied the chirographum, then the justices were to be summoned to appear and *record*, says Glanville, in court the reasons why such a plea, between such parties of such land, ceased; and, if the parties came to a concord and agreement by their assent, what the form of that concord was. As to the method of making this record, there was this difference observed between a concord made in the king's chief court and that before the justices itinerant: if in the latter, then the justices were summoned, that they, with certain discreet knights of the county where the concord

[b] Glanv. lib. 8. c. 3, 4.

was

was made, who were preſent at making the concord, and knew the truth of the matter, ſhould appear in court, there to make a record of the plea. Accordingly a writ to that effect was directed to the ſheriff to ſummon the juſtices and knights [c]. Beſides this, the ſheriff of the county where the plea had been, was commanded to have the record of the plea then before the king or his juſtices by four diſcreet knights of the county. This is the firſt mention we have of the writ of *recordari*, ſo named from the words of it: *Præcipio tibi quòd facias* RECORDARI *in comitatu tuo loquelam, &c.* [d] When the juſtices appeared, and had agreed upon the record, that record was to be abided by, neither party being allowed to make any exception to it; only, if ſuch doubts ſhould ariſe, which there was no poſſibility of removing, then the plea might be recommenced, and proceeded in afreſh [e].

Of records.

HAVING ſaid thus much of records of courts, it may be proper on this occaſion to enquire a little further concerning theſe muniments of judicial proceedings. No court had, generally and regularly, ſuch remembrances of its proceedings as were called and eſteemed records, except the king's court, that is, as it ſhould ſeem, the court where the king's juſtices ſat; though, by what we have juſt related, it ſhould ſeem that the juſtices itinerant had not *regularly* a court of record. In other courts, if any one had ſaid that which he would not willingly own, he might be permitted to deny it, in oppoſition to the whole court, by the oaths of three perſons, affirming that he never ſaid it; or by more or leſs, according to the cuſtom of different courts.

IN ſome ſpecial inſtances, however, county and other inferior courts had records; and that, as we are informed by our great authority Glanville, by virtue of a law made by the council of the realm [f]. Thus, if in any inferior

[c] Glanv. lib. 8. c. 5, 6.
[d] Ibid. c. 6, 7.
[e] Ibid. c. 8.
[f] When this law was made, we do not know; nor is it mentioned any where, that I know of, but in this paſſage of Glanville.

court

court duel was waged, and afterwards the plea was removed into the king's court, then the claim of the demandant, the defence of the tenant, the form of words in which the duel was awarded and waged; of all theſe the court had a record, which was acknowledged as ſuch by the king's court. But it had a record of nothing elſe, except only of the change of a champion: for if, after the removal of the plea into the king's court, another champion than he who had waged duel in the inferior court was produced, and a queſtion aroſe upon it; in this caſe alſo it was decided by the record of the inferior court, according to the direction of the ſtatute before alluded to. Beſides, any one might object to the record of an inferior court, declaring that he had ſaid more than was now to be found in the record; and, that what he had ſo ſaid he would prove againſt the whole court by the oaths of two or more lawful men, according as the uſage of the court required; for no court was bound either to maintain or defend its record by duel; this, therefore, was the only proof that could be had. We are informed by Glanville, that a particular law[s] had been made, ordaining that no one ſhould except to a record *in part*, and admit the remainder; though he might deny *the whole* by oath, as juſt ſtated *.

THE king might occaſionally confer on any court the privilege to have a *record*. Thus, upon ſome reaſonable cauſe being ſhewn, he might, as has juſt been obſerved, direct a court to be ſummoned *to make a record* of a matter for the inſpection of his own court; ſo that, if the king pleaſed, there could be no contradiction admitted to ſuch record. It often happened that a court was ſummoned to have the record of ſome plea before the king or his juſtices, although it had, in truth, no ſuch record. In this caſe,

[s] Of this law alſo, and the time when it was made, there is no remembrance but this ſlight intimation.

* Glanv. lib. 8. c. 9.

the

the parties, by admiſſion and conſent, might ſettle a record of the matter between them. The writ on this occaſion uſed to be of the following kind: *Rex vicecomiti ſalutem. Præcipio tibi quòd* FACIAS RECORDARI *in comitatu tuo loquelam quæ eſt inter A. et B. de terrâ, &c. in villâ, &c. et habeas recordum illius loquelæ coram me vel juſtitiis meis ad terminum, &c. per quatuor legales milites, qui interfuerunt, ad recordum id faciendum. Et ſummone per bonos ſummonitores A. qui terram illam clamat, quòd tunc ſit ibi cum loquelâ ſuâ, et B. qui terram illam tenet, quòd tunc ſit ibi ad audiendum illud, &c.* [h].

AGAIN, inferior courts had occaſionally records of what was done there, which were tranſmitted to the king's court: as when a lord had a plea in his court of ſome doubt and difficulty, which could not be well determined there, then he might *curiam ſuam ponere in curiam domini regis*, as they called it, or adjourn the matter into the king's court, to have the advice of that tribunal what was proper to be done; an aſſiſtance which the king owed to all his barons. When a lord was in this manner certified what was adviſeable to be done, he returned with the plea, and proceeded to determine upon it in his own court. County courts had a record of pledges, or ſureties taken there, and of ſome few other matters [i].

WE before ſaid, that courts were not bound to defend their records by duel; but they were obliged to defend their *judgments* in that manner: as if any one ſhould declare againſt a court for paſſing *a falſe judgment* againſt him, and ſhould ſtate it to be *therefore* falſe, becauſe when one party ſaid thus, and the other anſwered thus, the court gave a falſe judgment thereon in ſuch and ſuch words, and paſſed that judgment by the mouth of N. and ſhould conclude, that if it was denied, he was ready to prove it by a lawful witneſs there ready to deraign it; in this caſe, the que-

[h] Glan. lib. 8. c. 9, 10.

[i] Ibid. c. 11.

ſtion

ſtion might be decided by the duel. But there were ſome doubts whether the court was to defend its judgment by one of his own members, or by ſome ſtranger. Glanville ſeems to have been of the former opinion; for, he ſays, the defence was to be by the perſon who paſſed the judgment. If the court was convicted in this manner, the lord of the court was in the king's mercy, and loſt his court for ever; and beſides this, the whole court was in the king's mercy [k].

Writ *de homagio recipiendo.*

We ſhall now ſpeak of the remedy the law allowed to compel a lord to receive the homage of his tenant, and ſo enable him to claim the protection conſequent thereon [l]. If a lord would not receive the homage of the heir, nor a reaſonable relief; then the relief was to be kept ready, and to be repeatedly tendered to the lord by good men: and if he would not at any rate accept it, the heir might complain of him to the king or his juſtices, upon which he would have this writ: *Præcipe N. quòd juſtè et ſine dilatione recipiat homagium et rationabile relevium K. de libero tenemento quod tenet in villâ, &c. et quòd de eo tenere clamat. Et niſi fecerit, ſummone, &c.*

The proceſs againſt the defendant was the ſame as has often been mentioned before in caſes of ſummons. If he appeared and acknowledged the complainant to be the heir, and confeſſed he had tendered his homage and relief, he was to receive it inſtantly, or appoint a day for doing it. The ſame was to be done, if he denied the tender, but admitted the complainant to be the heir; but if he denied he was the heir, then the heir, if he was out of ſeiſin, might have an aſſiſe againſt the lord *de morte anteceſſoris;* if he was in ſeiſin, he might hold himſelf in, till it pleaſed the lord to accept his homage; for the lord was not to have the relief, till he had accepted homage. But if the lord doubted whether he was the lawful heir or not, and it had appeared

[k] Glanv. lib. 8. c. 9.

[l] We have before ſeen how important it was for the heir that the lord ſhould receive his homage. Vid. ant. 123.

to

to the vicinage, that he was not, the lord might then take the land into his own hands, till it was made appear whether he was the heir. And this was the way in which the king always dealt with his barons: for the king, upon the death of a baron holding of him in chief, immediately retained the barony in his own hands, till the heir gave security for the relief; and this, notwithstanding the heir was of full age [1].

Lords might defer receiving homage and relief, upon reasonable cause shewn; as suppose some other person than the heir pretended a right to the inheritance, or any part of it; for while that suit depended, he could not receive homage or relief. Another cause was, when the lord thought he had a right to hold the inheritance in demesne. In such case, if he commenced a suit by the king's writ, or that of his justices, against the person in seisin of the land, the tenant might put himself upon the king's great assise, which proceeded much in the way we before stated, as will appear by the following writ: *Rex vicecomiti salutem. Summone per bonos summonitores quatuor legales milites de vicineto villæ, &c. quòd sint coram me vel justitiis meis die, &c. ibi, ad eligendum super sacramentum suum duodecim, &c. qui melius rei veritatem sciant, et dicere velint, ad faciendam recognitionem, utrùm N. majus jus habet tenendi unam hidam terræ, in villâ, &c. de T. vel ipse R. tenendi eam in dominico suo, quam ipse R. petit per breve meum versus prædictum N. et unde N. qui terram illam tenet, posuit se in assisam meam, et petit recognitionem fieri, utrùm ille majus jus habeat tenendi terram illam in dominico, vel prædictus N. tenendi de eo. Et summone per bonos summonitores prædictum N. qui terram illam tenet, quòd tunc ibi sit auditurus illam electionem, &c.* [m].

If a lord could not, by distress or otherwise, compel his tenant to render his services and customs legally due; recourse was then had to the king or his chief-justice,

[1] Glanv. lib. 9. c. 4, 5, 6.

[m] Ibid. c. 6, 7.

from

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from whom he might obtain the following writ to the sheriff, directing that he himself should see justice done to the complainant; which is the first instance we have yet mentioned of the form of a writ of *justicies*. *Præcipio tibi quòd* JUSTICIES *N. quòd justè et sine dilatione faciat R. consuetudines et recta servitia quæ ei facere debet de tenemento suo quod de eo tenet in villâ, &c. sicut rationabiliter monstrare poterit eum sibi deberi, ne oporteat eum amplius inde conqueri pro defectu recti, &c.* In pursuance of this writ, the sheriff, in his county court, held a plea of the matter in question, and the party complaining might therein recover his services and dues, according to the custom of the county. If he made out his right, the other party, besides rendering what was due, was in the mercy of the sheriff: for the *misericordia* or *amercement* which arose out of any suit in the county court, always went to the sheriff. The *quantum* of this was ascertained by no general law, but depended on the custom of different counties, and the opinion of the persons who assessed it [n].

Purpresture.

NEXT, as to the remedy to be pursued in case of purprestures. *Purpresture*, or according to Glanville *porpresture*, was, when any unlawful encroachment was made upon the king; as intruding on his demesnes, obstructing the public ways, turning public waters from their course, or building upon the king's highway [o]: in short, whenever a nuisance was committed upon the king's freehold, or the king's highway, a suit concerning such nuisance belonged to the king's crown and dignity. These purprestures were enquired of either in the chief court of the king, or before the king's justices, who were sent into different parts of the kingdom for the purpose of making such inquisitions, by a jury of the country, or of the vicinage [p]. Whosoever was convicted by a jury of having committed such purprestures, was in the king's mercy for the whole fee he

[n] Glanv. lib. 9. c. 8, 9, 10.
[o] *Regiam plateam.*
[p] *Per juratam patriæ sive vicineti.*

held

held of the king, and was obliged to reſtore what he had incroached upon. If the purpreſture conſiſted in building in ſome city upon the king's ſtreet, the edifice, ſays Glanville, ſo built, was forfeited to the king, and the party remained in the king's mercy. The *miſericordia domini regis*, which has been ſo often mentioned, is explained in this paſſage by Glanville to be, when any one is to be amerced by the oaths of twelve lawful men of the vicinage; ſo, however, *ne aliquid de ſuo honorabili contenemento amittat*, as not to loſe his *countenance*, or appearance in the world. When any purpreſture was committed againſt a private perſon, it was conſidered in a different way. If it was againſt the lord of the fee, and not within the proviſions of the ſtatute about aſſiſes, then the tranſgreſſor was made to appear in the lord's court, provided he held any tenement of him. This was by the following writ: *Rex vicecomiti ſalutem. Præcipio tibi quòd juſticies N. quòd ſine dilatione veniat in curiâ I. domini ſui, et ibi ſtet ei ad rectum de libero tenemento ſuo quod ſuper eum occupavit, ut dicit, ne oporteat, &c.*[q]. If, upon this writ, he was convicted of the purpreſture in the lord's court; he loſt, without recovery, the freehold he held of the lord.

If he held no freehold of the lord, then the lord might implead him by a writ of right in the court of the chief lord. In like manner, if any one committed a purpreſture upon a perſon not his lord, and the fact did not come within the proviſion about aſſiſes, he might be impleaded in a writ of right. But if it was within that law, then there ſhould be a recognition upon the novel diſſeiſin to recover ſeiſin; of which proceeding we ſhall have occaſion to ſpeak more hereafter. In theſe purpreſtures it uſually happened, that the boundaries of lands were broke in upon and confounded; upon which, at the prayer of any of the neighbours, the following writ might be iſſued: *Rex vicecomiti ſalutem. Præcipio tibi quòd juſtè et ſine*

[q] Glanv. lib. 9. c. 11, 12.

*dilatione*

*dilatione facias esse rationabiles divisas inter terram R. in villâ, &c. et terram Ade de Byri sicut esse debent, et esse solent, et sicut fuerunt tempore regis Henrici avi mei, unde R. queritur quòd Adam injustè, et sine judicio, occupavit plus inde quàm pertinet ad liberum tenementum suum de Byri; ne amplius inde clamorem audiam pro defectu justitiæ, &c.*[r].

We have hitherto treated of the remedies in use for vindicating a right to land, and its appendant services and profits. We shall now take leave of this subject for a while, and consider the nature of personal contracts; such as buying, selling, giving, lending, and the like; upon which there arose *debts* and obligations to pay. This subject is intitled, in the language of this period, *de debitis laicorum*, to distinguish it from those debts and dues that were recoverable in the ecclesiastical courts, as being things of a supposed spiritual nature; such as money due by legacy, or upon promise of marriage[s].

*De debitis laicorum.*

Pleas, therefore, *de debitis laicorum* belonged to the king's crown and dignity. If any one complained to the *curia regis* of a debt owing to him which he was desirous should be enquired of in that court, he had the following writ of summons: *Rex vicecomiti salutem. Præcipe N. quòd justè et sine dilatione reddat R. centum marcas quas ei debet, ut dicit, et unde queritur quòd ei deforceat. Et nisi fecerit, summone eum per bonos summonitores, quòd sit coram me vel justitiis meis apud Westmonasterium, à clauso Paschæ in quindecim dies, ostensurus quare non fecerit, &c.* This was the form of the writ of debt.

The manner of enforcing an appearance to this writ, was as in other cases of summons. It should be observed here, that it was not usual for the *curia regis* in any case to compel obedience to a writ by distraining the chattels; therefore, even in a plea like this, the defendant might be di-

[r] Glanv. lib. 9. c. 13, 14.

[s] For this vide Fleta, p. 131.

strained

ſtrained by his fee and freehold, or, as in ſome other ſuits, by attachment of pledges[t].

When they were both in court, then it was to be conſidered how the demand aroſe. This might be of various kinds; as *ex cauſâ mutui*, upon a borrowing; *ex cauſâ venditionis*, upon a ſale; *ex commodato*, upon a lending; *ex locato*, upon a hiring; *ex depoſito*[u], upon a depoſit; or by ſome other cauſe by which a *debt* aroſe: for, at this time, all matters of perſonal contract were conſidered as binding, only in the light of *debts*; and the only means of recovery, in a court, was by this action of debt.

A debt aroſe *ex mutuo*, when one lent another any thing which conſiſted in number, weight, or meaſure. If a perſon, upon ſuch a lending, received back again more than he lent, it was uſury; and if he died under the reputation of an uſurer, we have ſeen the infamy with which his memory was ſtained. A thing was ſometimes lent *ſub plegiorum datione*; that is, ſome one was ſurety for the reſtoration of it; ſometimes, *ſub vadii poſitione*, that is, a pledge was given; ſometimes, *ſub fidei interpoſitione*, when a bare promiſe was made for the return; ſometimes, *ſub chartæ expoſitione*, when a charter was made acknowledging ſuch lending; and ſometimes with all theſe ſecurities together.

Of ſureties.

When any thing was owing *ſub plegiorum datione* only, if the principal debtor had not wherewithal to pay, recourſe was had to the ſureties by the following writ: *Rex vicecomiti ſalutem. Præcipe N. quòd juſtè et ſine dilatione acquietet R. de centum marcis verſus N. unde eum applegiavit, ut dicit, et unde queritur quòd eum non ac-*

[t] Glanv. lib. 10. c. 1, 2, 3.

[u] It is almoſt unneceſſary to remark, that theſe expreſſions are all borrowed from the civil law; the ſame may be ſaid of the definitions hereafter given of theſe different obligations; but, notwithſtanding this, the matter of Glanville's diſcourſe upon the ſubject of debts and obligations bears no reſemblance to the imperial juriſprudence. This is one ſtrong and very remarkable circumſtance to ſhew, that the uſe made of the Roman law by our old writers was not to *corrupt*, but to adorn and elucidate our municipal cuſtoms. Vide Inſt. lib. 3. tit. 15.

*quietavit*

*quietavit inde. Et nisi fecerit, summone eum per bonos summonitores, &c.*[x]. If the sureties appeared in court, and confessed the suretyship, they were then obliged to pay the debt at certain times affixed in court, unless they could shew that they were released from their engagement, or had in some way satisfied the demand. Sureties, if more than one, were held to be severally bound for the whole (unless there had been some special agreement to the contrary), and they were both to be proceeded against for satisfaction: therefore, should any of them be insufficient, the remainder were to be answerable for the deficiency. If the sureties, however, had specially engaged for particular parts of the payment, it was otherwise. There might arise a dispute between the creditor and the sureties, or between the sureties, upon this point. In like manner, if some of the sureties engaged for the whole, and some for parts only, then the former would have a question to debate with the latter. In what manner all these points were to be proved, will be seen presently. When the sureties had paid what was due, they might resort to the principal by a new action of debt, as will be shewn hereafter. However, it should be remarked, if any one had become surety for a person's appearance in a suit, and he had fallen into the king's mercy for the default of the principal, he could not recover by action of debt against the principal what he had so paid; for it was a rule, that should any one become surety for a person's answering in the king's court, in any suit belonging to the king's crown and dignity, as for breach of the peace, or the like, he fell into the king's mercy, if he did not produce the principal; but he was thereby, notwithstanding, released from the engagement,

[x] This writ was, in after-times, called *de plegiis acquietandis*, and used to be brought by the sureties against the principal debtor; though in the time of Glanville we find it lay for the creditor against the surety. F. N. B. It must be confessed, the wording of it in Glanville seems more adapted to the modern than the antient application of the writ.

gagement, as a ſurety, and therefore there could be no further proceeding inſtituted thereon[x].

If ſome of the ſureties denied they were ſureties, and ſome confeſſed it, then the queſtion would be, as well between the creditor and the ſureties, as between the ſureties themſelves. There was a doubt what ſhould, in this caſe, be the mode of proof; whether by duel, or whether the ſureties were to deny their engagement by the oaths of ſuch number of perſons as the court ſhould require. Some thought that the creditor himſelf, by his own oath, and that of lawful witneſſes, might make proof of it againſt the ſureties, unleſs the ſureties could avoid his oath by any lawful objection: and if ſo, ſays Glanville, they muſt reſort to the duel[y].

Things were lent ſometimes *ſub vadii poſitione*; and then either moveables, as chattels, or immoveables, as land, tenements, and rents, were given in pledge. A pledge was given either at the time of lending, or not. It was given, ſometimes for a certain term, ſometimes without any fixed term, ſometimes in *mortuo vadio*, ſometimes not. *Mortuum vadium*, or *mortgage*, was, when the fruits, or rent ariſing therefrom, did not go towards paying off the demand for which it was pledged. When moveables were pledged, and ſeiſin thereof, as it is called, given to the creditor for a certain term, the law required that he ſhould ſafely keep it, without uſing it ſo as to cauſe any detriment thereto; and if any detriment happened to it within the term appointed, it was to be ſet off againſt the debt, according to the damage ſuſtained. If the thing pledged was ſuch as neceſſarily required ſome expence and coſt, as to be fed or repaired, perhaps there would be ſome agreement between the parties about it, and that agreement was to be the rule of ſuch contingent expences. It was ſometimes agreed, that if the pledge

[x] Glanv. lib. 10. c. 3, 4, 5. [y] Ibid. c. 6. [z] Ibid. c. 7.

was not redeemed at the term fixed, it ſhould remain to the creditor, and become his property. If there was no ſuch agreement, the creditor might quicken the redemption by the following writ: *Rex vicecomiti ſalutem. Præcipe N. quòd juſtè et ſine dilatione acquietet, &c. quam invadiavit R. pro centum marcis uſque ad terminum qui præteriit, ut dicit, et unde queritur quòd eam nondum acquietavit: et niſi fecerit, &c.*[z]

It was doubted by Glanville, in what manner the defendant was to be compelled to appear to this writ; whether he was to be diſtrained by the pledge itſelf, or in what other way. This, it ſeems, was left to the diſcretion of the court; and might be effected, either by that or ſome other method. He ought, however, to be preſent in court before the pledge was quit-claimed to the creditor, for he might be able, perhaps, to ſhew ſome reaſon why it ſhould not. If he then confeſſed his having pledged the thing, as he thereby in effect confeſſed the debt, he was commanded to redeem it in ſome reaſonable time; and if he did not, the creditor had licence to treat the pledge as his own property. If he denied the pledging, he muſt either ſay the thing was his own, and account for its being tranſferred out of his poſſeſſion, as lent or intruſted to him; or deny it to be his; and then the creditor had licence to conſider it as his own property. If he acknowledged it was his, but denied the pledge and debt both; then the creditor was bound to prove both: and the manner of proof, where pledges denied their ſuretyſhip, we have before mentioned. But the debt could not be demanded before the expiration of the term agreed upon[a].

If the pledge was made without mention of any particular term, the creditor might demand his debt at any time. When the debt was paid, the creditor was bound to reſtore the pledge in the condition he received it, or

[z] Glanv. lib. 10. c. 8. [a] Ibid. c. 8.

make

make satisfaction for any injury that it had received: for it was a rule, that a creditor was to restore the pledge, or make satisfaction for it; if not, he was to lose his debt[b].

When it happened, that a debtor did not make delivery of the pledge at the time of receiving the thing lent, Glanville doubts what remedy there was for the creditor, as the same thing might be pledged, both before and after, to several persons; for it must be observed, says our author, that it was not usual for the *court of our lord the king* to give protection to, or warrant private agreements about giving or receiving things in pledge, or about other matters, if made out of court, or if made in other courts than *that of our lord the king*: and therefore, when such conventions were not observed, the *curia regis* would not entertain any suit for the establishment of them. The debtor, therefore, could not be put to answer about the priority of pledging; and[c] the person who was the loser by it, must content himself with the consequence of his own negligence.

When a thing immoveable was put in pledge, and seisin thereof given to the creditor for a certain term, it was generally agreed between them whether the rents and profits should, in the mean time, go towards the discharge of the debt, or not. An agreement of the first kind was considered as just and binding; the latter as unjust and dishonest, and was the *mortuum vadium*, or *mort-gage* before mentioned. Though this was not wholly prohibited by the king's court, yet it was reputed as a species of usury, and punishable in the way before mentioned. In other respects, the rules of law respecting this pledge were the same as those before stated in the case of a moveable, when pledged. It must be added, that should the debtor pay the debt, and the creditor still detain the pledge, the debtor might have the following writ to the sheriff: *Præcipe N. quòd justè et sine dilatione reddat R. totam terram illam in* Mortgages.

[b] Glanv. lib. 10. c. 8. [c] Ibid. c. 8.

*villâ, &c. quam ei invadiavit pro centum marcis ad terminum qui præteriit, ut dicit, et denarios ſuos inde recipiat;* OR, *quam ei acquietavit, ut dicit; et niſi fecerit, ſummone eum per bonos, &c.*[d]. The creditor, upon his appearance in court, would either acknowledge the land to be given in pledge, or would claim to hold it in fee. In the firſt inſtance, he ought to reſtore it, or ſhew a reaſonable cauſe why he ſhould not. In the ſecond, it was put either at the prayer of the creditor or debtor, upon the recognition of the country, whether the creditor had the land in fee, or in pledge; or whether his father or any of his anceſtors was ſeiſed thereof, as in fee or in pledge, on the day he died; and ſo the recognition might be varied many ways, according as the demandant claimed, or the tenant anſwered to that claim. But if a recognition was prayed by neither party, the plea went on upon the right only[e].

IF the creditor by any means loſt his ſeiſin, whether through the debtor or through any one elſe, he could not recover ſeiſin by any judgment of the court, nor by a recognition of novel diſſeiſin; but if he was diſſeiſed of his pledge unlawfully, and without judgment of any court, the debtor himſelf might have an aſſiſe of novel diſſeiſin: and ſhould he have been diſſeiſed by the debtor himſelf, he had no way of getting poſſeſſion again but through the debtor; for he muſt reſort to the principal plea of debt, to compel the debtor to make him ſatisfaction[f].

THUS far of proving a debt by ſureties and by pledge; but where the creditor had neither of theſe to prove his demand, nor any other proof, but only the faith or promiſe of the debtor, this was held no ſufficient proof in the king's court; but he was left, ſays Glanville, to his ſuit in the court chriſtian *de fidæi læſione vel tranſgreſſione*, for breach of promiſe. Though the eccleſiaſtical judge might take cognizance of this as a criminal matter, and inflict a

[d] Glanv. lib. 10. c. 8, 9. [e] Ibid. c. 10. [f] Ibid. c. 11.

penance

penance upon the party, or enjoin him to make satisfaction; yet we have seen, that he was prohibited by one of the Constitutions of Clarendon, to draw into that jurisdiction, and determine questions concerning lay-debts or tenements, upon pretence of any *promise* having been made respecting them[g].

If then the creditor had neither sureties nor pledge, he was driven to find some other proof. He might make out the matter either *per testem idoneum*, *per duellum*, or *per cartam*, i. e. by a fit witness, or by the duel, or by a charter. If the debtor's charter or that of his ancestor was produced, and he did not acknowledge it, he might controvert it several ways. Perhaps he might admit it to be his seal, but deny that the charter was made by him or with his assent; or he might deny the charter and seal both. In the first case, if he acknowledged publicly in court the seal to be his, so great regard was had to a seal, that he was thereby considered as having acknowledged the charter itself, and was bound to observe the covenants therein contained; it being his own fault, if he suffered any injury for want of taking care of his own seal. In the latter case, the charter might be proved in the duel by a fit witness, particularly by one whose name was inserted as a witness in the charter. There were other ways of establishing the credit of a charter; as by shewing other charters signed with the same seal, which were known to be the deeds of the person who denied this; and if the seals, upon comparison, appeared exactly the same, it was held as a clear proof; and the party against whom it was to operate lost his suit, whether it related to debts, land, or any other matter: and he was moreover to be *in misericordiâ* to the king; for it was a general rule, that when a person had said any thing in court or in a plea which he again denied, or which he could not warrant, or bring proof of, or which he was compelled

[g] Glanv. lib. 10. c. 12. Vid. ant. 78.

to

to gainsay by contrary proof, he always remained *in misericordiâ*. If a person had given more securities than one for a debt, they might all be resorted to at once; otherwise many securities would not be of more benefit than one [h].

We have hitherto been speaking of lending and borrowing; we come now to a debt arising *ex commodato:* as if one lent another a thing *without any gratuity*, to use, and derive a benefit from it; when that use and benefit was attained, the thing was to be restored without detriment; but if the thing perished, or was damaged in his keeping, a recompence was to be made for the damage sustained: but how this damage was to be valued, and if the thing was lent for a certain term, or to be used in a certain place, how a recompence was to be made, should he exceed that term and deviate from that place; or how that excess was to be proved, or whose property the thing was to be considered, Glanville signifies his doubts; only as to the property, he thought that retaining the thing beyond the stated time and place could not well be called *furtum*, or stealing; because he had possession of it originally through the right owner. Glanville also doubted, whether the owner, if he had any use for it himself, might demand his thing so lent before the time was expired, or before any breach of the agreement as to the place [i].

Next as to debts arising *ex empto et vendito*. A sale was considered as effectually completed when the price was agreed upon, so as there was a delivery of the thing sold, or the price paid, in part or in the whole, or that at least earnest was given and received. In the first two cases, neither of the contracting parties could recede from the bargain, unless on a just and reasonable cause; as if there had been an agreement at first that either might declare off within a certain time; for in this case, the rule of law operated, that *conventio vincit legem*. Again, if the thing was sold

[h] Glanv. lib. 10. c. 12.

[i] Ibid. c. 13.

as ſound and without fault, and afterwards the buyer could prove the contrary, the ſeller was bound to take it back; however, it would be ſufficient if it was ſound at the time of the contract, whatever might afterwards happen: but Glanville had a doubt within what time complaint was to be made of this, particularly where there was no ſpecial agreement about it. Where earneſt was given, the purchaſer might be off his bargain, upon forfeiting his earneſt: but if the ſeller, in this caſe, wanted to be off, Glanville doubted whether he might, without paying ſome penalty, for otherwiſe he would be in a better condition than the purchaſer; though it was not eaſy to ſay what penalty he was to pay. In general all hazard reſpecting the thing ſold was to reſt with him who was in poſſeſſion of it at the time, unleſs there was ſome ſpecial agreement to the contrary [k].

In all ſales of immoveables, the ſeller and his heirs were bound to warrant the thing ſold to the purchaſer and his heirs, and upon that warranty he or his heirs were to be impleaded, in manner as we before ſtated. And if any moveable was demanded by action againſt the purchaſer, as being before ſold or given, or by ſome other mode of tranſfer conveyed to another (ſo as no felony was charged to have been committed of it), the ſame courſe was obſerved, ſays Glanville, as in caſe of immoveables: but if it was demanded of the purchaſer *ex cauſâ furtivâ*, he was obliged to clear himſelf of all charge of felony, or call a perſon to warrant the thing bought. If he vouched a *certain* warrantor to appear within a reaſonable time, a day was to be fixed in court. If the warrantor appeared, but denied his warranty, then the plea went on between him and the purchaſer, and they might come to the deciſion of the duel. Glanville made a queſtion, whether ſuch a warrantor might call another warrantor; and if ſo, what limit was to be ſet to this vouching to warranty. In this caſe of calling a

[k] Glanv. lib. 10. c. 14.

*certain*

*certain* warrantor, when a thing was demanded *ex causâ furtivâ*, the warrantor uſed not to be ſummoned, as in other caſes of warranty; but on account of the particular nature of this charge, he was attached by the following writ to the ſheriff: *Præcipio tibi, quòd ſine dilatione attachiari facias per ſalvos et ſecuros plegios N. quòd ſit coram me vel juſtitiis meis die, &c. ad warrantizandum R. illam rem quam H. clamat adverſus R. ut furtivam, et unde prædictus R. eum traxit ad warrantum in curiâ meâ, vel ad oſtendendum quare ei warrantizare non debeat, &c.* [l].

THIS was the proceeding if he called a *certain* warrantor whom he could name. But if, in the phraſe of that time, he called un *uncertain* warrantor; that is, if he merely declared that he bought the thing *de legitimo mercatu ſuo*, fairly and honeſtly, and could produce ſufficient proof thereof, he was cleared of the charge of felony, as far as he might be affected criminally; not ſo, however, but that he might loſe the thing in queſtion, if it was really ſtolen, though not by the defendant. This was the method of proceeding, if any of theſe ſpecial circumſtances aroſe; but if it reſted upon the mere debt, that is whether *ex empto*, or *ex commodato*, it was made out by the general mode of proof uſed in court, namely, ſays Glanville, that by writing or by duel [m].

A DEBT *ex locato* and *ex conducto* accrued, when one lett out a thing to another for a certain time, at a certain reward: here the perſon letting was bound to impart the uſe of the thing letten, and the hirer to pay the price. In this caſe, the former might, at the expiration of the time, take poſſeſſion of the thing letten by his own authority ſolely: but Glanville made it a queſtion, whether, if the price was not paid according to the agreement, he might deprive the hirer of poſſeſſion by his own authority? But all theſe being what were then called private contracts, lying in the knowledge of the parties only, without any evidence to teſtify

[l] Glanv. lib. 10. c. 15, 16. [m] Ibid. c. 17.

their

their existence, were such, as was before observed *, of which the king's court did not usually take cognizance: others, which were *quasi privatæ*, hardly met with more consideration from the king's court [n]. This seems to have been a remarkable part of the jurisprudence of these times; and to have stood in need of the improvement afterwards, though very slowly, adopted, in actions upon promises.

THUS have we gone through those actions which were commenced originally in the *curia regis;* all which were called actions *de proprietate.* As these might be attended by the parties themselves, or by their attornies, it seems proper in this place to say something upon the law respecting attornies. These pleas, as well as some other civil pleas, might be prosecuted by an attorney; or, as he was called in those times, *responsalis ad lucrandum vel perdendum.* A person, when he appointed such *responsalis*, or attorney, ought to be present, and make the appointment in open court before the justices sitting there upon the bench; and no attorney ought to be received otherwise than from the principal then in court; though it was not necessary that the adverse party should be present at the time, nor even the attorney, provided he was known to the court. One person might be appointed attorney, or two, jointly, or severally; so as if one was not present to act, another might; and by such an attorney, a plea might be commenced and determined, whether by judgment or by final concord, as effectually as by the principal himself. It was not enough that any one was appointed bailiff or steward for the management of another's estate and affairs, to intitle him to be received as his attorney in court; but he must have a special authority for that particular purpose, to act in that particular cause, *ad lucrandum vel perdendum* for him in his stead. It was the practice to appoint in the *curia regis* an attorney to act in a cause depending in some

Of attornies.

* Vid. ant. 163.

[n] Glanv. lib. 10. c. 18.

other

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other court; and there then iſſued a writ of the following kind, commanding the perſon appointed to be received as ſuch: *Rex vicecomiti* (or whoever preſided in the court) *ſalutem: Scias quòd N. poſuit coram me* (or, *juſtitiis meis*) *R. loco ſuo ad lucrandum vel perdendum pro eo in placito, &c. quod eſt inter eum et R. de unâ carucatâ terræ in villâ, &c.; et ideò tibi præcipio quòd prædictum R. loco ipſius N. in placito illo recipias ad lucrandum vel perdendum pro eo, &c.* [o].

WHEN a perſon was appointed attorney, he might caſt eſſoins for the principal (and for him only, not for himſelf) till his appointment was vacated. When an attorney was appointed, and had acted in a cauſe, Glanville puts a queſtion, whether his principal could remove him at his pleaſure and appoint another, particularly if there had ariſen any great diſagreement between them? And he thought that the principal had that power; an attorney being put in the place of another, only in his abſence: and the practice was to remove an attorney at any part of a cauſe, and appoint another in court, in the form above-mentioned [p].

A FATHER might appoint his ſon his attorney, an inſtance of which we ſaw in the fine above ſtated, and ſo *vice verſâ*; and a wife might appoint a huſband. When a huſband acted as attorney to his wife, and loſt any thing in a plea of *maritagium* or dower, or gave up any right of the wife's, whether by judgment or final concord; it was made a queſtion by Glanville, whether the wife could afterwards inſtitute any ſuit for it, or was bound, after her huſband's death, to abide by what he had done? And it ſhould ſeem, ſays he, that ſhe ought not, in ſuch caſe, to loſe any thing by the act of her huſband; becauſe, while ſhe was *in poteſtate viri*, ſhe could not *contradict* him, or contravene his acts; and therefore could not, unleſs he pleaſed, attend to her own property and concerns: and

[o] Glanv. lib. 11. c. 1, 2.

[p] Ibid. c. 3.

yet,

yet, adds our author, it might be said on the other side, that whatever is transacted in the king's court ought to be held firm and inviolable [q]. Abbots and priors of canons regularly used to be received as attornies for their societies, of course, without letters from their convent: other priors, whether of canons or monks, if they were cloistered, even tho' they were aliens, were never received in court without letters from their abbot or chief prior. The master of the Temple and the chief prior of the hospital St. John of Jerusalem were received of themselves; but no inferior persons of their order. When one or more were appointed attornies in the above manner, it was made a question by Glanville, whether one might appoint his colleague to act for him, or some third person, *ad lucrandum vel perdendum* [r].

THE principal might be compelled to fulfil every thing that was done by his attorney, whether by judgment or final concord; though it was settled, beyond a question or doubt, that upon the default or inability of the principal, the attorney was not liable [s]. When it is said, that the principal must be present in court to appoint his attorney, it must be remembered what was before laid down; namely, that if a tenant did not appear after the third essoin, but sent an attorney, such attorney should be received: but this was allowed for the necessity of the thing, as he was compelled by the judgment of the court, or by process of distress, to put some one in his place *ad lucrandum vel perdendum*.

THE foregoing writs of right were commenced directly and originally in the *curia regis*, and were there determined. There were some writs of right which were not brought there originally, but were removed thither, when it had been proved that the court of the lord where they were brought, had *de recto defeciſſe*, as it was called, or failed in doing justice between the parties; and, in that case,

[q] Glanville, lib. 11. c. 3. [r] Ibid. c. 5. [s] Ibid. c. 4.

such

such causes might be removed into the county court, and from thence into the *curia regis*, for the above reason [t].

Writ of right in the lord's court.

When, therefore, any one claimed freehold land, or service, held of some other person than the king, he had a writ of right directed to his lord, of whom he claimed to hold the land, to the following effect: *Rex comiti W. salutem. Præcipio tibi, quòd sine dilatione teneas plenum rectum N. de decem hidis terræ in Middleton, quam clamat tenere de te per liberum servitium fœdi unius militis pro omni servitio. Et nisi feceris, vicecomes de Northamptone faciat, ne amplius inde clamorem audiam pro defectu justitiæ, &c.* The form of these writs was capable of infinite variety, according to the subject and circumstances of the demand [u]. Glanville says nothing upon the order and course of conducting these pleas in the lord's court, except intimating that they depended on the custom of the particular court [w] where they were brought.

The way of proving a court *de recto defecisse*, to have failed in doing justice, was this: The demandant made his complaint to the sheriff in his county court, and there shewed the king's writ: upon this the sheriff sent some officer of his to the lord's court, on the day appointed by the lord for the parties to appear, that he, in the presence of four or more lawful knights, who were to be present by the sheriff's command, might hear and see the demandant make proof that the court *de recto defecisse*: this proof was to be by his own oath, and the oaths of two others swearing with him to the fact. By this solemnity were causes removed out of many courts into the county court, and were there heard over again, and finally determined, without the lord or his heirs being allowed to make any claim for recovery of their judicature, as far as concerned that cause. Should a cause be removed before it had been proved in the above manner that there was a

[t] Glanv. lib. 12. c. 1. [u] Ibid. c. 3, 4, 5. [w] Ibid. c. 6.

failure

failure of juſtice, the lord might, on the day appointed for hearing the cauſe, make claim of cognizance, and for reſtoration of his court; but this was never done in the *curia regis*, unleſs he had claimed it three days before, in the preſence of lawful men; it not being ſuitable to the dignity of that court to be ouſted, upon ſlight grounds, of the cognizance of a cauſe once entertained there. If no day was appointed in the lord's court, and therefore proof of failure of juſtice could not be made in the above way, the complainant might *falſare curiam*, falſify the court, or deprive it of its cognizance, by making that proof any where within the lord's fee, if the lord did not reſide uſually there; for though a lord could not hold his court without his fee, he might by law have it any where within it; if he did reſide there, it was, probably, to be made at his manſion-houſe [x].

THE writ of right, of which we have juſt ſpoken, was to be directed to the lord, of whom the demandant claimed to hold immediately; not to the chief lord. But it might ſometimes happen that the demandant claimed to hold the thing in queſtion of one lord, and the tenant claimed to hold of another: in this caſe, becauſe one lord ſhould not be enabled to diſpoſſeſs another of his court and franchiſe, the ſuit of neceſſity belonged to the county court; and from thence it might be removed to the *curia regis*, where both lords might be ſummoned, and their ſeveral rights diſcuſſed in their preſence, as we before mentioned in caſes of warranty [y].

Of writs of juſticies.

We have ſaid, that the above-mentioned writs of right belonged to the ſheriff, upon failure of the lord's court. To the ſheriff alſo belonged ſeveral other ſuits, one of which, namely, that *de nativis* [z], we have already mentioned. In ſhort, all cauſes where the writ of the king or his juſtices directed him to do right between the parties (called ſince

[x] Glanv. lib. 12. c. 7. [y] Ibid. c. 8. [z] Vid. ant. 142.

writs

writs of *juſticies*), and ſuch as contained the proviſional clauſe *quòd ſi non rectum fecerit, tunc ipſe facias, &c.* all theſe gave the ſheriff a judicial authority to hear and determine [a]. Theſe writs were very numerous: ſome of them are mentioned by Glanville, from whom may be extracted a ſhort account, that will give an idea of this provincial judicature. There was a writ directed to a lord, commanding him *ne injuſtè vexes*, by demanding more ſervices than were due; and unleſs he deſiſted, the ſheriff was commanded to ſee right done [b]. This is the only proviſional writ; the reſt are all peremptory, directed to the ſheriff ſolely. One was to give poſſeſſion of a fugitive villain and his chattels [c]; for admeaſurement of paſture which was ſuperonerated [d]; *quòd permittat habere* certain eaſements [e]; to make *rationabiles diviſas* [f]; to obſerve a *rationabilem diviſam* of chattels, that had before been made [g]; to reſpite a recognition directed to be taken by the juſtices [h]; a *facias habere rationabilem dotem*; to take care of a deceaſed man's chattels for payment of his debts [i]; and to give poſſeſſion of chattels that had been taken at a diſſeiſin of the land, after the land had been recovered in an aſſiſe of novel diſſeiſin [k]. To theſe we muſt add writs of *replevin*, and two of *prohibition* to the eccleſiaſtical court, which deſerve to be mentioned more at length.

In the former part of this inquiry into judicial proceedings, we have ſeen that when land was ſeiſed into the king's hand for default or contempt of the tenant, he might within a certain time replevy his land, upon performing what was required of him by the court. The power of diſtraining, which lords exerciſed over their tenants, required a ſimilar qualification; either that the tenant ſhould perform what was due; or, at leaſt, till it

[a] Glanv. lib. 12. c. 9.
[b] Ibid. c. 10.
[c] Ibid. c. 11.
[d] Ibid. c. 13.
[e] Ibid. c. 14.
[f] Ibid. c. 16.
[g] Ibid. c. 17.
[h] Ibid. c. 19.
[i] Ibid. c. 20.
[k] Ibid. c. 18.

was

was ascertained by judgment, whether any thing, or what was due, he should replevy; that is, have a return of his goods *upon pledges* given as a security to stand to the award of justice in the matter. In order to effect this, several writs of *replegiare*, or *replevin* were devised. One was in this form, and seems to approach nearest to the modern writ of replevin. *Rex vicecomiti salutem. Præcipio tibi, quòd justè et sine dilatione* FACIAS HABERE G. AVERIA SUA PER VADIUM ET PLEGIUM; *unde queritur, quòd R.* EA CEPIT ET DETINET INJUSTE *pro consuetudinibus quas ab eo exigit, quas ipse non cognoscit se debere; et ipsum præterea inde justè deduci facias, ne oporteat eum, &c.*[l]. The next is in the nature of a prohibition, as well as a writ of replevin; tho' it is not properly a prohibition, which was always to prohibit a judicial proceeding. It is as follows: *Rex vicecomiti salutem. Prohibeo tibi ne permittas quòd R. injustè exigat ab S. de libero tenemento suo quod tenet de N. de fœdo ipsius R. in villâ, &c. plus servitii quàm pertinet ad illud liberum tenementum quod tenet; et* AVERIA SUA QUÆ CAPTA SUNT *pro illâ demandâ, quam ille non cognoscit ad liberum tenementum suum, quod tenet, pertinere, ei* REPLEGIARI FACIAS *donec loquela illa coram nobis audiatur, et sciatur utrùm illud servitium debeat vel non, &c.*[m].

and of prohibition.

To these may be added the two writs of prohibition to the ecclesiastical court, just alluded to. *Rex, &c. judicibus ecclesiasticis salutem. Prohibeo vobis ne teneatis placitum in curiâ christianitatis quod est inter N. et R. de laico fœdo prædicti R. unde ipse queritur quòd N. eum trahit in placitum in curiâ christianitatis coram vobis, quia placitum illud spectat ad coronam et dignitatem meam, &c.*[n]. Besides this writ to the judges, there went also an attachment against the party suing in the court christian, to the following effect: *Rex vicecomiti salutem.* PROHIBE *R. ne sequatur placitum in curiâ christianitatis quod est inter*

[l] Glanv. lib. 12. c. 12. [m] Ibid. c. 15. [n] Ibid. c. 21.

N.

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*N. et ipſum de laico fœdo ipſius prædicti N. in villâ, &c. unde ipſe queritur, quòd præfatus R. inde eum traxit in placitum in curiâ chriſtianitatis coram judicibus illis. Et ſi præfatus N. fecerit te ſecurum de clamore ſuo proſequendo, tunc* PONE PER VADIUM ET SALVOS PLEGIOS *prædictum R. quòd ſit coram me vel juſtitiis meis die, &c. oſtenſurus quare traxit eum in placitum in curiâ chriſtianitatis de laico fœdo ſuo, in villâ, &c. de ſicut illud placitum ſpectat ad coronam et dignitatem meam, &c.* [o]. The manner of ordering the before-mentioned ſuits in the county-court, depended on the cuſtoms of different counties: for which reaſons, as well as becauſe it was not ſtrictly within the deſign of his work, there is no notice in Glanville [p].

BEFORE we leave the ſubject of writs of right, it will be proper to add ſome obſervations reſpecting the form of writs and of the proceedings thereon. The form of words in which a title to land was ſtated by the demandant, was called his *petition* * or demand, from the word *peto*, with which it begun. It ſometimes happened, that the writ contained more or leſs in it than the *petitio* ſtated to the court, as to the appurtenances of the land, or particular circumſtances of the caſe. Sometimes there was an error in the writ, as to the name of the party, or the *quantum* of ſervice, or the like. When the writ contained leſs than the petition, no more could be recovered than was ſtated in the writ; but when the writ contained more than the petition went for, the ſurplus might be remitted, and the remainder might well be recovered by the authority of that writ. If, however, there was any error in the name, then by the ſtrictneſs of law another writ ſhould be prayed: again, when there was an error in ſtating the *quantum* of ſervice, the writ was loſt. Suppoſe a writ of right, directed to the lord, ſtated the land to be held by leſs ſervices than were really

[o] Glanv. lib. 12. c. 22.

[p] Ibid. c. 23.

* This term is borrowed from the civil and canon law, where it is uſed in a ſimilar ſenſe. The *petitio* is called *count* in our law French.

due,

due, Glanville thought that, in such case, the lord could not refuse to receive the writ, and proceed upon it, under pretence of his being concluded thereby, and suffering a detriment to his service; but he was left to make good his claim of service against the demandant, should he recover against the tenant[q]. This is all that is to be collected from Glanville on the formal part of *Pleading;* a branch of our law which grew, in after-times, to such a size, and was considered with so much nicety and refinement.

It had become the law and custom of the realm, says Glanville, that no one should be bound to answer in his lord's court concerning his freehold, without the precept or writ of our lord the king, or his chief justice, if the question was about a lay fee; but if there was a suit between two clerks concerning a freehold held in frankalmoigne, or if a clerk should be tenant of ecclesiastical land held in frankalmoigne, whoever might chance to be demandant against him, the plea concerning the right ought, in such case, to be in *foro ecclesiastico;* unless it should be prayed to have a recognition, *utrùm fœdum ecclesiasticum sit vel laicum*, whether it was an ecclesiastical or lay fee, of which we shall say more hereafter; for then that recognition, as well as all others, was had in the king's court[r].

We have now dismissed the proceedings for the recovery of *rights*, with all their incidents and appendages, as far as any intimation upon this subject has come down to us. The next thing that presents itself to our consideration, is the method of recovering *seisin*, or mere possession. The remedies for recovery of seisin seem to be founded on the policy of preserving peace and quiet in matters of property. As seisin was the *primâ fâcie* evidence of right, the law would not allow it to be violated on pretence of any better right; and had provided many ways of proceeding to vindicate the seisin, sometimes in opposition to the

Of recognitions.

[q] Glanv. lib. 12. c. 22. [r] Ibid. c. 25.

mere right. As queſtions concerning ſeiſin came within the benefit of the late ſtatute of Henry II. to which we have ſo often before alluded, and were accordingly in general decided by *recognition*, we ſhall therefore ſpeak of the different kinds of recognitions[s].

ONE of thoſe recognitions was called *de morte anteceſſoris;* another, *de ultima præſentatione;* another, *utrùm tenementum ſit fœdum eccleſiaſticum vel laicum;* another, whether a perſon was ſeiſed at the day of his death *ut de fœdo*, or *ut de vadio;* another, whether a perſon was within, or of full, age; another, whether a perſon died ſeiſed *ut de fœdo*, or *ut de wardâ;* another, whether a perſon made the laſt preſentation to a church by reaſon of being ſeiſed in fee or in ward; and the like queſtions, which often aroſe in court between parties; and which, as well by the conſent of parties as by the advice of the court, were directed to be enquired of in this way, to decide the fact in diſpute. There was one recognition which ſtood diſtinguiſhed among the reſt, and was called *de novâ diſſeiſinâ*, of novel diſſeiſin[t]. We ſhall ſpeak of all theſe in their order.

*Aſſiſa mortis anteceſſoris.*

FIRST, of the recognition *de morte anteceſſoris*, which ſeems to be a proceeding particularly calculated for the protection of heirs againſt the intruſion made by their lords, upon the death of the anceſtor laſt ſeiſed. If any one died ſeiſed of land, and was ſeiſed *in dominico ſuo ſicut de fœdo ſuo;* that is, had the inheritance and enjoyment thereof to him and his heirs; the heir might demand the ſeiſin of his anceſtor by the following writ: *Rex vicecomiti ſalutem. Si G. filius T. fecerit te ſecurum de clamore ſuo proſequendo, tunc ſummone per bonos ſummonitores duodecim liberos et legales homines de vicineto de villâ, &c. quòd ſint coram me vel juſtitiis meis die, &c. parati ſacramento recognoſcere, ſi T. pater prædicti G. fuit ſeiſitus in dominico ſuo ſicut de fœdo ſuo, de*

[s] Glanv. lib. 13. c. 1. [t] Ibid. c. 2.

*unâ*

*unâ virgatâ terræ in villâ, &c. die quâ obiit; si obiit post primam coronationem meam, et si ille G. propinquior hæres ejus est. Et interim terram illam videant, & nomina eorum imbreviari facias. Et summone per bonos summonitores R. qui terram illam tenet, quòd tunc sibi auditurus iliam recognitionem. Et habeas ibi summonitores, &c.* This writ was varied in some parts of it, according to the circumstances under which the person died seised; as, whether he was seised the day he undertook a peregrination to Jerusalem, or St. Jago, in which journey he died; or the day he took upon him the habit of religion, the latter being a civil death, which intitled the heir to succeed immediately[u]. If the heir was within age, the clause "*si G. filius T. fecerit te securum de clamore suo prosequendo*" was left out, the infant not being able, by law, to bind himself in any security; as was also the clause, *si T. pater prædicti G. obiit post primam coronationem meam*[x]."

When the sheriff had received this writ, and the demandant had given security in the county court for prosecuting his claim[y], they proceeded to make an assise in this way: Twelve free and lawful men of the vicinage were chosen, according to the direction of the writ. This was in the presence, perhaps, of the parties; though it might be in the absence of the tenant, provided he had been properly summoned to attend: for he should always be once summoned, to hear who were chosen to make the recognition; and, if he pleased, he might except to some, upon any reasonable cause. If he did not come at the first summons, they did not wait for him; but the twelve jurors were elected in his absence, and sent by the sheriff to view the land or tenement whose seisin was in dispute: and Glanville says, that the tenant was to have one summons more. The sheriff caused the names of the twelve

[u] Glanv. lib. 13. c. 2, 3, 4, 6.
[x] Ibid. c. 5.
[y] *De clamore suo prosequendo.*

to be inſerted in a writ[z]; then ſummoned the tenant to be preſent at the day appointed by the writ, before the king or his juſtices, to hear the recognition. The tenant might eſſoin himſelf at the firſt and ſecond day (provided the demandant was not an infant), but there was no eſſoin allowed him at the third day; for then the recognition was taken, whether he came or not; it being a rule, that no more than two eſſoins ſhould be allowed in any recognition upon a ſeiſin only; and in a recognition upon a novel diſſeiſin, there was no eſſoin at all. At the third day, then, the aſſiſe was taken, whether the tenant came or not. If the jurors declared for the demandant, the ſeiſin was adjudged to him, and a writ of the following kind went to the ſheriff to give execution thereof: *Scias quòd N. dirationavit in curiâ meâ ſeiſinam tantæ terræ in villa, &c. per recognitionem de morte anteceſſoris ſui verſus R. et ideo tibi præcipio quòd* SEISINAM *illam ei ſine dilatione* HABERE FACIAS, *&c.*[a].

By force of this writ he recovered not only ſeiſin of the land, but ſeiſin of all the chattels and every thing elſe which was found upon the fee at the time of ſeiſin being made by the ſheriff. When the ſeiſin was in this manner recovered, the perſon who loſt might afterwards, notwithſtanding, conteſt the right, in a writ of right; but Glanville doubted, how long after the ſeiſin ſo delivered, he might purſue his remedy for the right[b]. If the oath of the jurors was in favour of the tenant, and he was abſent, the ſeiſin remained to him, without the adverſe party having any power to recover it: though this did not take away his cauſe of action for the right, as in the former caſe; nor, on the other hand, did a ſuit depending upon the right to a tenement, extinguiſh a recognition upon the ſeiſin of one's anceſtor, unleſs the duel was waged upon the right; though the purſuing ſuch a recognition was a ſort of contempt of court; the puniſhment, however, of which Glanville ſeems to think was not aſcertained[c].

[z] *Imbreviavit.* [a] Glanv. lib. 13. c. 7, 8. [b] Ibid. c. 9. [c] Ibid. c. 7.

WHEN

Exceptions to the aſſiſe.

When both parties appeared in court, it uſed to be aſked of the tenant, if he could ſay any thing why the aſſiſe ſhould *remanere*, as they called it; that is, ſhould be barred, or not proceed. Many good cauſes might be ſhewn why the aſſiſe ſhould *remain*. If the tenant confeſſed in court, that his anceſtor, whoſe ſeiſin was in queſtion, was ſeiſed in his demeſne as of fee, the day he died, with all the circumſtances expreſſed in the writ, there was no need to proceed in the aſſiſe; but if he confeſſed the ſeiſin only, and denied all, or ſome circumſtances, the aſſiſe proceeded upon thoſe circumſtances which were not admitted.

There were many other cauſes upon which the aſſiſe *mortis anteceſſoris* uſed to remain. The tenant might admit, that the demandant was ſeiſed after the death of his father, or ſome other anceſtor (whether ſuch anceſtor was ſeiſed the day of his death or not); and that being in ſuch ſeiſin, he did ſuch or ſuch an act which deprived him of the benefit of the aſſiſe; as for inſtance, that he ſold the land to him, or made a gift of it, or quit-claimed it, or made ſome other lawful alienation thereof: and upon theſe points, ſays Glanville, they might go to the trial by duel, or any other kind of proof which was uſually allowed by the court in queſtions of right. In like manner, the tenant might ſay, that the demandant had heretofore commenced a ſuit againſt him concerning the ſame land, and that there was then a fine made between them in the king's court; or that the land fell to him upon a final deciſion by duel, whether the duel was in the king's court or any other; or that it was his by the judgment of ſome court, or by quit-claim ſolemnly made. Villenage might be objected againſt the demandant; and if proved, it took away the aſſiſe; as did alſo the exception of baſtardy, and the king's charter confirming to the tenant the land in queſtion; the conjunction of more heirs than one, as of women in a military fee, and of men and women together

in

in free foccage. Again, if it were admitted, that the anceſtor whoſe ſeiſin was in queſtion had a ſeiſin of ſome ſort or other, namely, that he had it from the tenant or his anceſtor, either in pledge, or *ex commodato*, or by any ſimilar means; in theſe caſes, the aſſiſe was to remain, and the plea to proceed in ſome other way. Conſanguinity was an exception which took away the aſſiſe.

WHERE it happened, as we before mentioned in ſpeaking of frank-marriage, that the eldeſt brother gave part of his land to his younger brother, who died without heirs of his body; in ſuch caſe, the aſſiſe would remain, on account of the rule before ſtated, that *nemo poteſt hæres ſimul eſſe ejuſdem tenementi et dominus*. In like manner, if the demandant either confeſſed, or was proved to have been in arms againſt the king, any aſſiſe which he might bring againſt another would, *ipſo facto*, remain. We are told alſo by Glanville, that by force of a particular law[d], burgage-tenure was a good exception to cauſe the aſſiſe to remain. When none of theſe, nor any other cauſe was ſtated why the aſſiſe ſhould remain, the recognition proceeded in form; and both parties being there preſent, the ſeiſin was tried by the oaths of the twelve jurors, and, according to their verdict, was adjudged to one party or the other[e].

WHEN the demandant in this aſſiſe was an infant, and the tenant was of full age, the tenant was not allowed an eſſoin, and the recognition proceeded the firſt day, whether the tenant appeared or not. It was ſo ordered for this never-failing reaſon, that whereſoever the tenant, if preſent in court, could ſay nothing why the aſſiſe ſhould remain, the recognition ought, by law, to proceed, without waiting for the appearance of the adverſe party. Now, in this caſe, if the tenant was preſent, the allegation

[d] This is another law alluded to by Glanville, of which we find no other mention.

[e] Glanv. lib. 13. c. 11.

of

of the demandant's infancy would be no cauſe for the aſſiſe to remain, and therefore the recognition was to proceed of courſe; but if reſtitution was made to the infant by the recognition, the minor's coming of age was to be expected, before he could be made to anſwer upon the queſtion of right, ſhould any be moved againſt him. The courſe was the ſame where both parties were minors [f].

But where the demandant was of full age, and the tenant a minor, it was different; for there the minor might eſſoin himſelf in the uſual way: and when he appeared, he might pray that the recognition might not be taken till he was of full age; and thus the recognition *de morte anteceſſoris* often remained, on account of the age of one of the parties. To procure, however, this delay, the minor muſt ſay, that he was in ſeiſin of the tenement in queſtion; and alſo, that his father or ſome other anceſtor died ſeiſed: for neither a recognition, nor a ſuit upon the right, would remain as againſt a minor, if he himſelf had acquired ſeiſin of the tenement, and he held it by no other right than what he had ſo made to himſelf. But ſhould it be replied to what the minor had ſaid, that true it was his anceſtor died ſeiſed of the tenement in queſtion, yet it was not *ut de fœdo*, but only *ut de wardâ*; then, though the principal recognition would remain on account of the age of the minor, yet a recognition would proceed on that point, and a writ of ſummons would accordingly iſſue for twelve jurors to the following effect: *Rex vicecomiti, &c. Summone per bonos ſummonitores duodecim liberos et legales homines de vicineto de villâ, &c. quòd ſint coram me vel juſtitiis meis ad terminum, &c. parati ſacramento recognoſcere ſi R. pater N. qui infra ætatem eſt, ſeiſitus fuit in dominico ſuo de unâ carucatâ terræ in villâ, &c. unde M. filius et hæres T. petit recognitionem de morte ipſius T. patris ſui verſus ipſum N. ut de fœdo ſuo die quâ obiit, vel ut de wardâ. Et interim terram illam videant, et nomina eorum*

[f] Glan. lib. 13. c. 12.

*imbreviari*

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*imbreviari facias. Et summone per bonos summonitores prædictum N. qui terram illam tenet, quòd sit ibi auditurus illam recognitionem, &c.* [z].

In this case the proceeding somewhat differed from other instances of recognitions; for if a day had been given to both parties, there was then no summons to the tenant to hear the recognition; but it proceeded without delay; and according to the verdict of these twelve jurors, delivered upon their oaths, it was declared what sort of seisin the ancestor had; and if it was only *ut de wardâ*, the demandant recovered against the minor. But Glanville doubts, whether this was enough to entitle the demandant to recover; for as yet, it did not appear that his ancestor died seised in his demesne as of fee, nor that he was the next heir; and he puts it as a question, whether recourse was to be had to the principal recognition upon that point. However that might be, yet in case it had been proved by the oaths of the twelve jurors, that the ancestor of the minor died seised as of fee, then the seisin was to remain to the minor till he attained his full age; but after he was come of age, the other party might bring in question *the right* either against him or his heirs. It should be remembered, that it was only in the above case that a recognition was allowed to proceed against a minor; for it was a general rule, that a minor was not bound to answer in any suit by which he might be disinherited, or lose his life or member: except, that he was obliged to answer to suits for his debts, and also for a novel disseisin. If, in the above case, the seisin had been adjudged to the demandant, restitution was to be made in the form before mentioned; and he, in like manner, could not be compelled to answer the minor upon *the right* till he was of full age. Such mutual permission to stir questions, after a determination, was grounded upon this prevailing reason, that whatever was

[z] Glanv. lib. 13. c. 13, 14.

transacted

transacted with persons under age, in pleas of this sort, ought not to remain fixed and unalterable [h].

If a person claimed the privilege of a minor, and it was objected to him that he was of full age, this was to be decided by the oaths, not of twelve, but of eight free and lawful men, who were summoned by a similar writ with those we have so often mentioned for summoning jurors: *octo liberos et legales homines de vicineto de villâ, &c. &c. recognoscere, utrum N. qui clamat unam hidam, &c. sit talis ætatis, quòd inde placitare possit et debeat. Et interim terram illam videant, et nomina eorum &c. &c.* [i]. If he was proved by this recognition to be of full age, they proceeded to the principal recognition, as in other cases. Here Glanville makes a question, whether he was thenceforward to be esteemed of full age, so as to lose his privilege of age as against all other persons: and again, suppose he had been found a minor, whether that was sufficient, without more, to entitle him to the privilege in all other suits [k].

*Assisa ultimæ præsentationis.*

The next recognition is that *de ultima præsentatione*. When a church was void, and a dispute arose about the presentation, the controversy might be determined by this recognition, at the prayer of either party. The writ in such case, was of the following kind: *Summone, &c. duodecim liberos et legales homines de vicineto*, &c. &c. *parati sacramento recognoscere, quis advocatus præsentavit ultimam personam, quæ obiit ad ecclesiam de villâ*, &c. *quæ vacans est, ut dicitur, et unde N. clamat advocationem. Et nomina eorum imbreviari facias. Et summone per bonos summonitores R. qui præsentationem ipsam deforceat, quòd tunc sit ibi auditurus illam recognitionem*, &c. [l] What the essoins were in this recognition, may be collected from what has gone before. The person to whom or to whose ancestors the last presentation

[h] Glanv. lib. 13. c. 15.
[i] Ibid. c. 15, 16.
[k] Ibid. c. 17.
[l] Ibid. c. 18, 19.

was

was adjudged by the recognition, was considered as having thereby obtained seisin of the advowson; so that he was to present to the first vacancy, and his parson was to hold the presentation during his life, whatever was the fact about *the right* of advowson; for the person who lost the last presentation by a recognition, might yet move a question upon the right of advowson [m].

THE tenant might, in this as well as the foregoing writ, state some reason why the assise should not proceed. He might say, that he admitted the ancestor of the demandant made the last presentation, as the real lord and heir; but that afterwards he transferred the fee, to which the advowson was appendant, to the tenant or his ancestors, by a good and lawful title: upon which allegation the assise would remain, and either party might pray a recognition upon the truth of this exception. Again, either party might admit that he or his ancestors made the last presentation, but that it was *ut de wardâ*, not *ut de fœdo*; upon which a recognition might be prayed, which would be summoned by a writ similar to the many we have mentioned: *duodecim liberos, &c. recognoscere, si R. qui præsentavit, &c. fecerit illam præsentationem ut de fœdo, vel ut de wardâ, &c.* And if the recognition declared the last presentation was made *ut de wardâ*, the advowson of the presentation was at an end, and thenceforth belonged to the other party; if *ut de fœdo*, the presentation remained to him [n].

WE come now to the recognition concerning a tenement, *utrùm sit laicum vel ecclesiasticum*, which might be had upon the prayer of either party. For summoning such a recognition, there issued a writ like the former: *recognoscere, utrum una hida terræ quam N. persona ecclesiæ de villâ, &c. clamat ad liberam eleemosinam ipsius ecclesiæ suæ versus R. in villâ, &c. sit laicum fœdum ipsius R. an fœ-*

[m] Glanv. lib. 13. c. 20. [n] Ibid. c. 20, 21, 22.

*dum*

*dum eccleſiaſticum. Et interim terram videant, &c*[o]. It was a rule in this, and indeed in all others, except the great aſſiſe, that no more than two eſſoins ſhould be had; for the third was never admitted, but where the court could be certified of the party's illneſs, whether he was *languidus* or not; and as this, ſays Glanville, was not uſually done in recognitions, they always were without a third eſſoin. This recognition proceeded in the ſame way as the former; and if it was proved by the recognition that the tenement was eccleſiaſtical, it could not afterwards be conſidered as a lay fee, though it might be claimed as holden by the church for a certain ſervice [p].

THE next was the recognition, whether a perſon died ſeiſed *ut de fœdo, vel ut de vadio*. If a perſon claimed a tenement as having been pledged by him or his anceſtors, and the other party claimed it not as a pledge, but in fee, then a recognition was reſorted to, and was ſummoned as in other caſes: *recognoſcere, utrùm N. teneat unam carucatam, &c. in fœdo, an in vadio, &c.* or it might be *utrùm illa carucata, &c. ſit fœdum vel hæreditas ipſius N. an invadiata ei ab ipſo R. vel ab ipſo H. anteceſſore ejus. Et interim terram videant, &c*[q]. Sometimes, when a perſon died ſeiſed *ut de vadio*, the heir, upon ſuch ſeiſin, would bring a writ *de morte anteceſſoris* againſt the true heir, who had by ſome means got ſeiſin of the land; and then, if the tenant admitted the ſeiſin of the demandant's anceſtor, but ſaid it was *ut de vadio*, and not *ut de fœdo*; a recognition was ſummoned in the following form; *recognoſcere, utrùm N. pater R. fuerit ſeiſitus in dominico ſuo ut de fœdo, an ut de vadio, de unâ carucatâ, &c. die quâ obiit, &c*[r].

IF it was proved by the recognition to be a pledge only, and not an inheritance, then the tenant who claimed it as

[o] Glanv. lib. 13. c. 23, 24.
[p] Ibid. c. 25.
[q] Ibid. c. 26, 27.
[r] Ibid. c. 28, 29.

his

his inheritance loſt the tenement; ſo that he could not even make uſe of it, in the manner we mentioned concerning actions of debt, for the recovery of the debt for which it was a pledge. If, on the other hand, it was recognized to be an inheritance in the tenant, the demandant could recover it no other way (if at all) than by a writ of right. Glanville makes a queſtion, whether in this, or any other recognition, the warrantor was to be waited for, particularly if he was vouched after two eſſoins had been had [s].

THE nature of the recognitions which remain to be mentioned, may partly be collected from thoſe of which we have already treated, and partly from the terms of the award made in court for their being taken, and the allegations of both parties, which were to be tried. Indeed, ſome of them have been already noticed; as that for trying whether a perſon was of age [t]; that for trying whether a perſon died ſeiſed *ut de fœdo*, or *ut de wardâ* [u]; that for trying whether a preſentation was made in right of the inheritance, or only in right of a wardſhip [x]: all theſe recognitions were conducted as the others, in reſpect of eſſoins, and they proceeded or remained for the ſame reaſons as prevailed in the reſt [y].

IT muſt be obſerved of theſe *aſſiſes* (for ſo they are ſometimes called by Glanville, but more commonly *recognitions*), that they are not all of the ſame kind; that *de morte anteceſſoris* being evidently an original proceeding, independent of any other; the reſt (not excepting that *de ultimâ præſentatione* [z], and that *utrùm laicum fœdum vel eccleſiaſticum*) being merely for the deciſion of facts which aroſe in ſome original action or proceeding. Thus, the writs for ſummoning recognitions of the latter kind were ſimple writs of ſummons: they mention that a plea was

[s] Glanv. lib. 13. c. 30.
[t] Ibid. c. 15, 16, 17.
[u] Ibid. c. 13, 14, 15.
[x] Ibid. c. 20, 21, 22.
[y] Ibid. c. 31.
[z] That the aſſiſe de *ultimâ præſentatione* was ſuch, ſee what we have before ſaid, p. 110, in the plea upon a right of advowſon, where this writ is awarded to try a collateral matter, ariſing in a writ of right of advowſon.

depending

depending in court by the king's writ; and they were granted at the prayer of either party; so that they seemed to be resorted to by the assent of parties, for settling an incidental question, on which they put the dispute between them. On the other hand, the writ *de morte anteceſſoris* has all the appearance of an original commencement of a suit. It issued only upon condition the demandant gave security to prosecute it,--SI *G. filius T. fecerit te ſecurum de clamore ſuo proſequendo*, TUNC *ſummone*,---and made no mention of a plea depending. Of the same kind was the writ *de novâ diſſeiſinâ*, which will be mentioned presently. Thus, then, of all the assises in use in Glanville's time, it was only that *de morte anteceſſoris*, and that *de novâ diſſeiſinâ*, that were original writs. Whether there were any recognitions for trying collateral facts, besides those mentioned in Glanville, it is difficult to determine; this being one of the many circumstances of which we must remain ignorant, for want of knowing the terms of the famous law made by Henry II. about assises.

*Aſſiſa de novâ diſſeiſinâ.*

WE shall, lastly, speak of that which was called the *recognitio de novâ diſſeiſinâ*. When any one disseised another of his freehold unjustly, and without any judgment of law to authorise him, and the fact was within the king's assise; that is, if it was since the last voyage of the king to Normandy [a], which was, it seems, the time limited for this purpose in the famous law so often alluded to; he might then avail himself of the benefit of that law, and have the following writ to the sheriff: QUESTUS EST *mihi N. quòd*

[a] This was A. D. 1184, in the 30th year of Henry II.; so that the time of limitation, during that reign, was never more than about four years.

In the printed text of Glanville, there are these words between brackets: *Quod quandoque majus quandoque minus cenſetur*; which passage has been thought to import, that the time of limitation was often varied in this king's reign. Another meaning of this passage may be, that the period (the *terminus à quo*) being fixed, it must necessarily, by the lapse of time, be lengthening every day. After all, the passage lies under some suspicion of interpolation, and was, perhaps, for that reason put between brackets by the editor. This voyage into Normandy is referred to by later writers, as the limitation before the statute of Merton altered it.

*R. in-*

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*R. injustè et sine judicio disseisivit eum de libero tenemento suo in villâ, &c. post ultimam transfretationem meam in Normanniam: et ideo tibi præcipio, quòd* SI PRÆFATUS N. FECERIT TE SECURUM DE CLAMORE SUO PROSEQUENDO, *tunc facias tenementum illud reseisiri de catallis quæ in eo capta fuerunt, et ipsum cum catallis esse facias in pace usque ad clausum Paschæ. Et interim facias duodecim liberos et legales homines de vicineto videre terram illam; et nomina eorum imbreviari facias. Et summone illos per bonos summonitores, quòd tunc sint coram me vel justitiis meis, parati inde facere recognitionem.* ET PONE PER VADIUM ET SALVOS PLEGIOS PRÆDICTUM R. VEL BALLIVUM SUUM, SI IPSE NON FUERIT INVENTUS, *quòd tunc sit ibi auditurus illam recognitionem, &c.* [b].

THESE writs of novel disseisin were of different forms, according to the nature of the freehold in whose prejudice the disseisin was made. There is one in Glanville for razing or prostrating a dyke *ad nocumentum liberi tenementi;* another for razing a mill-pool *ad nocumentum liberi tenementi;* another for a common of pasture appertaining *ad liberum tenementum* [c]. These are all the writs of novel disseisin mentioned in Glanville.

IN this recognition no essoin was allowed, but the recognition proceeded at the first day, whether the disseisor appeared or not; for here no delay was suffered either on account of minority, or a vouching to warranty; unless a person would in court first acknowledge the disseisin, and then he might vouch a warrantor, and the recognition would remain; the disseisor would be in the king's mercy; the warrantor was summoned; and the proceeding went on between him and the disseisor, who vouched him. It must be observed, that in this recognition, whoever lost his suit, whether the demandant or tenant, or, as Glanville terms them (with a view perhaps to there being a sort of criminality [d] in a disseisin), the appellor and the appealed,

[b] Glanv. lib. 13. c. 32, 33.
[c] Ibid. c. 34, 35, 36, 37.
[d] In the canon law, a forcible intrusion into an ecclesiastical benefice is construed *rapina*. Corv. Jus Can. lib. 4. tit. 24.

he

he was in the king's mercy. If the appellor did not profecute, by keeping the day appointed, his pledges alſo were in the king's mercy; and the like happened to the other party, if he made default. The penalty ordained by the conſtitution which eſtabliſhed this proceeding was only the *miſericordia regis*, ſo often mentioned. It often happened in this recognition, that the demandant, after he had proved the diſſeiſin, wanted a writ to the ſheriff to be put in poſſeſſion of the produce and chattels upon the land, the form of which writ we have before ſhewn [d]. It ſhould be remarked, that this writ to recover the chattels purſued the original writ of novel diſſeiſin, which directed the party to be reſeiſed of the chattels: in no other recognition was there any mention in the judgment *de fructibus et catallis* [e].

Of terms and vacations.

HAVING taken this view of the divers manners in which juſtice was obtained, it ſeems to follow that ſomething ſhould be ſaid of the times which were allotted, at this early period, for the regular adminiſtration of it. The diviſion of the year into term and vacation has been the joint work of the *church* and *neceſſity*. The cultivation of the earth, and the collection of its fruits, neceſſarily required a time of leiſure from all attendance on civil affairs; and the laws of the church had, at various times, aſſigned certain ſeaſons of the year to an obſervance of religious peace, during which all legal ſtrife was ſtrictly interdicted. What remained of the year not diſpoſed of in this manner, was allowed for the adminiſtration of juſtice. The Anglo-Saxons had been governed by theſe two reaſons, in diſtinguiſhing the periods of vacation and term; the latter they called *dies pacis regis*; the former *dies pacis Dei et ſanctæ eccleſiæ* [f]. The particular portions of time which the Saxons had allowed to theſe two ſeaſons were adhered to by the Normans, together with other Saxon uſages; and their term and vacation were as follow.

[d] Glanv. lib. 13. c. 38, 39. [e] Ibid. c. 38. [f] Leg. Confeſ. c. 9.

IT seems that *Hilary* term began *Octabis Epiphaniæ*; that is, the 13th of January, and ended on Saturday next before Septuagesima; which being moveable, made this term longer in some years than others. *Easter* term began *Octabis Paschæ* (nine days sooner than it now does), and ended before the vigil of Ascension (that is, six days sooner than it now does). *Trinity* term began *Octabis Pentecostes*; to which there does not seem to have been any precise conclusion fixed by the canon which governed all the rest; it was therefore called *terminus sine termino*: it seems to have been determined by nothing but the pressing calls of hay-time and harvest, and the declension of business, very natural at that season. But the conclusion of it was fixed afterwards by parliament: by stat. 51 Hen. III. it was to end within two or three days after *quindena sancti Johannis*; that is, about the 12th of July. In latter times, by stat. 32 Hen. VIII. Trinity term was to begin *Crastino sanctæ Trinitatis*. *Michaelmas* term began on Tuesday next after St. Michael, and was closed by Advent; but as Advent-Sunday is moveable, and may fall upon any day between the 26th of November and 4th of December; therefore the 28th of November, as a middle period, by reason of the feast and eve of St. Andrew, was appointed for it. Thus were the terms in the latter part of the Saxon times, and during this period, almost in the same state we have them now; and by them the return of writs and appearances were governed [z].

The criminal law.

HAVING gone through the law of private rights, and the several remedies furnished for the recovery and protection of property; it remains to say something of the criminal law, as it stood in the latter end of the reign of Henry II. But, previous to this, it may be proper to take a view of some few regulations that had been made on the subject of crimes and punishments antecedent to the time of which we are now writing. We have seen that a law was made

[z] Spelman Orig. of Terms.

by

by William the Conqueror, which took away all capital punishments, and, instead thereof, directed various kinds of mutilation. This law was repealed in one instance, A. D. 1108, in the 9th year of Henry I. when it was enacted, that any one taken *in furto vel latrocinio* should be hanged, without allowing any pecuniary *were* to be paid, as a redemption [h]. The law of William, however, still operated in other cases: the punishment of crimes consisted in mutilations of various kinds; and it will presently be seen that this law of Henry I. was dispensed with, or repealed.

Some provisions respecting the administration of criminal justice had been made by the statutes of Clarendon, that were republished at Northampton. It was thereby directed, that any one charged before the king's justices with the crime of murder, theft, robbery, or receipt of such offenders, of forgery, or of malicious burning, by the oaths of twelve knights of the hundred; if there were no knights, by the oaths of twelve free and lawful men, and by the oaths of four out of every vill in the hundred; that any one so charged, should submit to the water ordeal; and if he failed in the experiment, he should lose one foot: and afterwards at Northampton it was added, in order to make the punishment more severe, that he should lose his right hand, as well as one of his feet; and also that he should abjure the realm, and leave it within forty days; and even if he was acquitted by the water ordeal, that he should find pledges to answer for him; and then he might remain in the realm, unless he was charged with a murder, or some other heinous felony, by the commonalty, and lawful knights of the country. If he was charged with any of those crimes, notwithstanding his acquittal by the ordeal, he was to leave the kingdom within forty days, and carry all his goods with him (with a saving of all claims his lord might have on them), and so abjure the realm, and be at the king's mercy, as to any permission to return.

Of abjuration.

[h] Wilk. Leg. Ang. Sax. p. 304.

return. This regulation was to be in force *ſo long as the king pleaſed*, in all caſes of murder, treaſon, and malicious burning; and in all the before-mentioned crimes, except in *ſmall* thefts and robberies committed during the war (which was juſt concluded), in taking horſes, oxen, and the like.

THUS an offender was ſubjected to a trial, by which, if convicted, he was to loſe a limb, and be baniſhed; if acquitted, he was likewiſe to be baniſhed. Such a method of proceeding can be imputed to nothing but ſome doubt entertained of the juſtneſs of this trial by ordeal. It is related, that, before this, William Rufus having cauſed fifty Engliſhmen of good quality and fortune to be tried by the hot iron, they eſcaped unhurt, and were of courſe acquitted; upon which that monarch declared he would try them again by the judgment of his court, and would not abide by this pretended judgment of God, *which was made favourable or unfavourable at any man's pleaſure.* The king looked upon this trial to be fraudulently managed, as no doubt it was; and Henry II. convinced of the fraud, would not allow ſuch an acquittal to have its full effect [i]; though it is a ſtrong mark of the barbariſm and prejudices of theſe times, that a practice liable to ſuch ſuſpicion was ſtill ſuffered to continue as a judicial proceeding; and that they would rather puniſh thoſe who were lawfully acquitted by it, than altogether abandon ſuch an abominable proceeding.

ANOTHER proviſion made by the ſtatute of Northampton, related to the old law concerning decennaries. It declared that no one, in a borough or vill, ſhould entertain any ſtrange gueſt in his houſe more than one night, unleſs he would engage to anſwer for his appearance; or ſuch gueſt had ſome reaſonable excuſe for ſtaying, which his hoſt was to make known to the vicinage; and when he went away, it was to be by day, and in the preſence of the vicinage. Another ordinance was, to ſecure the puniſhment

[i] Litt. Hen. II. vol. 4. 279.

of

of criminals who had been profecuted, and appealed before the inferior magiſtrates, in order to a final trial before the king's juſtices: it declares, that any one taken for murder, theft, robbery, or forgery, and confeſſing himſelf guilty before the chief officer of the hundred or borough, or before certain lawful men, ſhould not be permitted to deny the fact, when brought before the juſtices [k].

SUCH is the ſubſtance of certain ſtatutes made for the improvement of criminal proceedings, in this and the preceding reigns. We ſhall now ſpeak of the penal law in general, and the way of proſecuting offenders, as practiſed towards the end of the reign of Henry II. But in this, we ſhall confine our enquiries to ſuch objects as relate to the *curia regis* only; contenting ourſelves with ſubjoining a ſhort account of the proceedings before juſtices itinerant.

Mode of proſecution.

WHEN a perſon was *infamatus*, as Glanville terms it, or accuſed of the death of a man, or of any ſedition moved in the realm or army, it was either upon the charge of a certain accuſor, or not. If no certain accuſor appeared, but he was accuſed only by the voice of public fame, or, as Glanville ſays, *fama tantùmmodo publica accuſat* (which ſignified probably nothing more than what the ſtatute of Northampton calls *per ſacramentum legalium hominum*); he was immediately to be ſafely attached, either by proper pledges, or by a much ſafer ſecurity, that is, *per carceris incluſionem*. Then the truth of the matter was inquired before the juſtices, by many and various inquiſitions and interrogations; every probability was to be weighed, and every conjecture to be attempted, from facts and circumſtances, which could be thought to make either on one ſide or the other. In concluſion, the criminal was either to be entirely acquitted, upon ſuch inquiry, or was to be put to purge himſelf *per legem apparentem*; that is, by a number of compurgators. If upon this trial *per legem* he

[k] Wilk. Leg. Ang. Sax. p. 330.

was convicted, his life and members depended upon the judgment of court, and the grace of the king, as in other cases of *felony*; for so Glanville calls this offence of *seditio regni vel exercitûs*[1].

If a certain accusor, or, as he is cometimes called by Glanville, and was afterwards more commonly called, an *appellor*, appeared at first, he was to be attached by pledges, if he could find any, for prosecuting the suit; if he could not find pledges, he was trusted upon his solemn promise and engagement to prosecute: and this was the more common security for prosecuting felonies; lest binding by too severe an obligation, might deter persons from assisting in bringing offenders to justice.

When the accusor had given security for prosecuting, then the person accused, as in the former case, used to be attached by safe pledges; and if he had none, was committed to prison: and it was a rule, that in all pleas of felony, except homicide, the accused person was to be discharged upon giving pledges.

Then a day was appointed, upon which the parties might have their lawful essoins. At length the accusor would propose what charge he had to make. He might perhaps say, that he saw, or would by some other means prove, the accused to have attempted or done something against the king's life, or towards moving sedition in the realm or army; or to have consented, or given aid, or counsel, or lent his authority towards such an attempt; and add that he was ready *dirationare*, to deraign or prove it, as the court should award: and if to this the person accused opposed a flat denial, then the whole was decided by the duel. When the duel was once waged in suits of this sort, neither party could decline or go back, under pain of being esteemed *pro victo*, and suffering all the consequences attending such a defeat; nor could they be reconciled, or

[1] Glanv. lib. 14. c. 1.

the

the queſtion between them be compromiſed, any otherwiſe than by the licence of the king or his juſtices.

If the parties, at length, engaged in the duel, and the appellor was vanquiſhed, he was to be *in miſericordiâ regis*; in addition to which he incurred perpetual infamy, and certain diſabilities which always attended the being vanquiſhed in a judicial duel. If the party accuſed was vanquiſhed, he ſuffered the judgment of life and limb abovementioned; and beſides that, all his property and chattels were confiſcated, and his heirs were diſinherited for ever. A remarkable difference is here to be obſerved between a conviction *per legem apparentem*, and by duel: on the former, which was a remnant of the old Saxon juriſprudence, a felon ſuffered only the pains of death; but if convicted on the latter, which was a mode of trial introduced by the Normans, he ſuffered the additional penalty of forfeiture.

Every freeman, being of full age, might be admitted to this ſort of accuſation, or appeal; yet ſhould a perſon within age appeal any one, he was nevertheleſs to be attached in the manner juſt mentioned. A ruſtic (by which it may be ſuppoſed that Glanville means a perſon not free) might bring ſuch an appeal; but a woman was not admitted to proſecute an appeal of felony, except in ſome particular caſes, which will be hereafter mentioned. The party accuſed might decline the duel, in ſuits of this ſort, on account of his age, or ſome mayhem received; that is, if he was ſixty years of age; or if he had broke a bone, or had ſuffered in his head, either *per inciſionem*, or *per abraſionem*; for ſuch only were conſidered as mayhems. And in theſe caſes, the party accuſed was to purge himſelf *per Dei judicium*: that is, by the hot iron, or by water, according to his condition: if he was *homo liber*, a free man, by the former; if a ruſtic, or not free, by the latter [m].

[m] Glanv. lib. 14. c. 1.

A SUIT

A SUIT for the fraudulent concealment of treaſure-trove was carried on as above ſtated, where there appeared a certain accuſor. But, upon a charge of this crime, like that above called *publica fama*, the law did not permit that any one ſhould be put to purge himſelf *per legem apparentem*, unleſs he had been before convicted, or had confeſſed in court, that he had found and taken ſome ſort of metal in the place in queſtion; and if he had been convicted thereof, the preſumption then was ſo much againſt him, that he was obliged to purge himſelf *per legem apparentem*, and ſhew that he had not found or taken any more. It ſhould ſeem, from Glanville, that a particular law had been made to authorize the court to compel ſuch a purgation, even where there was not the preſumption before mentioned [n].

WHEN any one was accuſed of homicide, it might be in the two ways ſtated, and the proceeding in either was as has been juſt ſeen. Only it ſhould be obſerved, that the accuſed was never diſcharged upon giving pledges, unleſs, ſays Glanville, by the interpoſition of the king's particular prerogative and pleaſure; by which it has been generally thought [o], that Glanville alludes to the writ *de odio et atiâ*, of which writ, however, we forbear to ſpeak particularly, till we arrive at a period when we are certain that it was in uſe.

Homicide.

THERE were two kinds of homicide: one that was called *murdrum*; which, in the words of Glanville, was *quod nullo vidente, nullo ſciente, clam perpetratur, præter ſolum interfectorem, et ejus complices*; *ita quòd mox non aſſequatur clamor popularis, juxta aſſiſam ſuper hoc proditam*; ſuch a ſecret killing, without the knowledge of any but the offenders, as prevented a hue and cry, ordained by ſtatute to be made after malefactors. In an accuſation or appeal for this crime of murder, none was admitted to pro-

[n] Glan. lib. 14. c. 2. [o] 2 Inſt. 42.

ſecute,

ſecute, except one who was of the blood of the deceaſed; and a nearer relation might exclude a remoter from deraigning the appeal. The other kind was that which was called *ſimple homicide*. In this crime alſo no one was admitted to become appellor, and make proof, unleſs he was allied to the deceaſed by blood, or by homage, or by dominion, and could ſpeak of the death upon the teſtimony of his own eyes. Thus we ſee the qualification of the perſon to become appellor in ſimple homicide, extended further than in caſes of murder; though it was required of him in this caſe, that he ſhould have been an eye-witneſs, which could not be in the former from the very deſcription of the crime, *nullo vidente*; and therefore the zeal and piety of the relation who charged a man with the crime, ſeems to have been taken inſtead of proof. Again, in this ſuit a woman might be heard as accuſor, if it was for the death of her huſband, and ſhe could ſpeak of what ſhe herſelf ſaw. It will be ſhewn preſently, that a woman might bring an appeal of an injury done to her own perſon, and, according to Glanville, it was only upon the conſideration of man and wife being *one* fleſh, that ſhe was allowed this appeal of the death of her huſband. In theſe caſes, the perſon accuſed might chuſe, either to let it reſt upon the proof made by the woman, or purge himſelf from the imputed crime *per Dei judicium*. Sometimes a perſon charged [p] with ſimple homicide, if he had been taken in flight, with a crowd purſuing him, and this was legally proved in court by a jury of the country, was obliged to undergo the legal purgation, without any other evidence being brought againſt him [q].

THE *crimen incendii*, or burning, was proſecuted and tried in the ſame way; as was alſo the *crimen roberiæ*, or robbery [r].

[p] The expreſſion in Glanville which is here rendered *charged* is *reflatus*.

[q] Glanv. lib. 14. c. 3.

[r] Ibid. c. 4, 5.

THE

Rape.

THE *crimen raptûs*, says Glanville, was, when a woman declared herself to have suffered violence from a man in the king's peace; by which latter circumstance nothing more was meant, than that the offence was such as was cognisable in the king's court only. The law directed, that when a woman had sustained an injury of this kind, she should go, while the fact was recent, to the next village, and there *injuriam sibi illatam probis hominibus ostendere, et sanguinem, si quis fuerit effusus, et vestium scissiones*; she was to do the same to the chief officer of the hundred; and, lastly, was to make a public declaration of it in the first county court; after which she was to institute her plaint, which was proceeded in as in other cases; a woman being suffered to prosecute her appeal in this, as in all other instances of an injury done to her person. It should be remembered, as we before said, that it was in the election of the person accused, either to submit to the burthen of making purgation, or leave it upon the evidence of the woman herself. The judgment, in this crime, was the same as in those before mentioned. It was not enough for the offender, after judgment passed, to offer marriage; for in that manner, says Glanville, men of a servile or inferior condition would be enabled to bring disgrace upon women of rank, not for once, but for ever; and, on the other hand, men of rank might bring scandal on their parents and relations by unworthy marriages. We are informed, however, by the same authority, that it was customary, before judgment passed, for the woman and the man to compromise the appeal, and marry, provided they had the countenance of the king's licence, or that of his justices, and the assent of parents [s].

THE *crimen falsi*, in a general and large sense, contained in it many species of that crime; the making of false charters, false measures, false money, and other falsifications; the manner of prosecuting which appeals was the

[s] Glan. lib. 14. c. 6.

same

ſame as thoſe we have juſt mentioned. A diſtinction, however, was obſerved between forging royal and private charters: if the former, the party was ſentenced as in caſe of læſe majeſty: if the latter, the offender was dealt more tenderly with, as in other caſes of ſmaller forgeries; which were puniſhed only by the loſs of limbs[t].

Of the *crimen furti*, or theft, and other pleas which belonged to the ſheriff's juriſdiction, Glanville gives no account, as they did not come within the deſign of his work, which was confined to the *curia regis*. The proſecution of them was ordered differently, according to the uſage and practice of different counties[u].

Proceedings before juſtices itinerant.

Thus ſtood the law of crimes, and the method of proceeding, as far as related to the ſuperior court. What was the office of the juſtices itinerant in the reign of Henry II. we have before ſtated from the ſtatute of Northampton, when this eſtabliſhment was revived. The juriſdiction of theſe juſtices was conſiderably encreaſed ſoon after; as may be collected from certain *capitula*, or articles of enquiry, which were delivered to the juſtices itinerant in the year 1194, which was the fifth year of Richard I. According to thoſe directions, they were to begin by cauſing four knights to be choſen out of the whole county, who, upon their oaths, were to elect two lawful knights of every hundred or wapentake; and thoſe two were to chuſe, upon their oaths, ten knights in every hundred or wapentake, and if there were not knights enough, then free and lawful men. Theſe twelve together were to anſwer to all the *capitula* which concerned that hundred or wapentake.

When that was done, the juſtices were to enquire of and determine both *new* and *old* pleas of the crown, and all ſuch as were not determined before the king's juſtices; alſo all *recognitions*, and all pleas which were ſummoned before the juſtices by the king's writ, or that of his chief-juſtice, or ſuch as were ſent to them from the king's chief court.

[t] Glanv. lib. 14. c. 8. [u] Ibid. c. 8.

They

CHAP. IV. WILLIAM the CONQUEROR to JOHN.

They were to enquire of eſcheats, preſentations to churches, wardſhips, and marriages, belonging to the king. They were to enquire of malefactors, and their receivers and encouragers; of forgers of charters and writings; of the goods of uſurers; of great aſſiſes concerning land worth 100 ſhillings a-year, and under; and of defaults of appearance in court.

They were to chuſe, or cauſe to be choſen, three knights and one clerk in every county, who were to be *cuſtodes placitorum coronæ*; the ſame, probably, who were afterwards called *coronatores*; but they are not mentioned by that name in this reign. They were to ſee that all cities, boroughs, and the king's demeſnes, were taxed. They were to enquire of certain rents in every manor of the king's demeſnes, and the value of every thing on thoſe manors, and how many carucates or ploughlands they contained. They were alſo to ſwear good and lawful men, who were to chuſe others in different parts of the county, to be ſworn to ſee the king's eſcheats and wardlands, as they fell in, well-ſtocked with all neceſſaries. Beſides theſe, there were ſeveral articles relating to the Jews, which were occaſioned by the outrages that had lately been committed by the populace againſt that people; as alſo concerning the lands and goods of John earl of Morton, who had incurred great forfeitures to the king[x].

In the year 1198, being the 10th year of this king, the juſtices itinerant had certain *capitula* delivered in charge to them, ſomewhat different from the preceding. As a view of ſuch articles is the only means of gaining a true idea of the commiſſion and office of theſe juſtices, it will be proper juſt to mention its contents. They were directed to hear and determine all pleas of the crown, both new and old, which had not been determined before the king's juſtices; and all aſſiſes *de morte anteceſſoris*, *de novâ diſſeiſinâ*, and *de magnis aſſiſis* concerning lands of 10l. by the year and under; and of advowſons of churches. They

[x] Wilk. Leg. Ang. Sax. p. 46, & ſeq.

were

were to enquire of vacant churches, wards, eſcheats, and marriages, as in the former *capitula*; of uſury; of thoſe *in miſericordiâ regis*; of purpreſtures; of treaſure-trove; of malefactors and their receivers; of fugitives; of weights and meaſures, according to the late aſſiſe made thereon the preceding year; of cuſtoms received by officers of ſea-ports; laſtly, of thoſe who ought to appear at the *iter*, but neglected their duty [y].

THIS ſame year, and before the *itinera* of the juſtices were over, the king appointed his juſtices of the foreſt to hold an *iter*, which was as ſolemn a proceeding as the other; but carried with it more terror, and a degree of oppreſſion, on account of the grievous nature of the inſtitution of foreſts in all its parts. Theſe juſtices were commanded to ſummon, in every county through which they went, all archbiſhops, biſhops, earls, barons, and all free tenants, with the chief officer and four men of every town, to appear before them *ad placita foreſtæ*, and hear the king's commands [z].

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The king and government.

IT does not come within the ſcope of this Hiſtory to enter minutely into a detail of the conſtitution and political events in the government of this and the ſucceeding times. A hiſtory, however, of our juriſprudence would be imperfect without giving ſome ſmall conſideration to this ſubject, ſo far, at leaſt, as it is connected with the formation and adminiſtration of our laws.

IN the firſt ages of civil ſociety, while laws are few, and the execution of them feeble, much muſt be left to the authority of the ſovereign power. As the experience of later times points out the deficiencies of former laws, and particular remedies are applied, the exerciſe of this ſovereign power ſeems ſo far to be abridged. The prero-

[y] Wilk. Leg. Ang. Sax. p. 350.

[z] Ibid. For the aſſiſe of the foreſt, and the articles of enquiry before the juſtices, ſee Wilk. Leg. Aug. Sax. p. 351.

gative

gative of the prince, and the dominion of the laws, in this manner occaſionally take place of each other: upon the increaſe of the latter, the former gives way and retires, collecting all its powers for the ſole purpoſe of aiding and enforcing a due obſervance of the eſtabliſhed law.

THE juſt and requiſite prerogative of the crown was perhaps very extenſive in the Saxon times; but after the Conqueſt there concurred a number of circumſtances, all tending to increaſe the power of the ſovereign beyond the mere exigencies of orderly government.

THE revolution effected by William did, in its conſequences, render that prince powerful beyond all the ſovereigns of his time, and all that have reigned ſince in this kingdom; for it threw the greateſt part of the nation into a ſtate of dependence on him for their lives and eſtates. The novelty of his reign, and the peculiar ſituation in which the prince ſtood, drove him upon every exertion of which his authority was capable; and, notwithſtanding he confirmed to the nation the enjoyment of all their cuſtoms and laws, he made thoſe laws themſelves occaſionally ſubmit to the controul of his power, whenever the neceſſities of his government demanded it. So much was the whole kingdom awed by his greatneſs, that no infringement of their laws was reſented by the people during his reign.

WHAT had been by force acquired to the Conqueror, continued in his ſucceſſor through the ſame force, or the prevalence of an eſtabliſhed government; and though ſome conceſſions were reluctantly made by ſubſequent monarchs, as will be ſeen hereafter, and the high claims of the crown were, in ſome degree, relaxed in favour of the people, they had no laſting effect: the exerciſe of an extenſive prerogative continued in the crown through all theſe reigns, and rendered the condition of the ſubject extremely precarious and miſerable.

THE

THE crown was assisted in the exercise of this prerogative by the manner in which the Norman law was introduced. The English, who had seen the laws of their Anglo-Saxon ancestors confirmed, had the fullest confidence that they should be governed by them in all questions concerning their persons and property. In the mean time, the Normans, who had taken sole possession of the king's court, had the debate and determination of all questions there agitated; and, continually recurring to the notions and principles of law in which they had been bred, determined conformably with that law most points of doubt and difficulty. Thus the English, while they possessed the letter of their law inviolate, saw all their old customs explained away; or so cramped and modified, as to amount almost to an abrogation of them.

IN this conflict between the Norman and English laws, the prerogative of the king must necessarily have found occasions of enlarging its pretensions. While the rules of property and methods of proceeding were yet fluctuating and unsettled, every chasm was supplied, and every impediment removed by the great power of the crown; the only subsisting authority which could reconcile the two contending polities. While the rights of persons and of property were not precisely defined, and it was not unanimously agreed by what set of rules and principles they were to be judged, the crown took every advantage, and interfered and dictated absolutely in most judicial enquiries.

IT was during this precarious state of our laws, that the people were constrained to purchase the favour of the crown, in order to obtain justice in the king's courts[a]. Fines were paid for the express purpose of having justice and right. Presents of a considerable value were made by suitors to obtain the opinion of the king's justices in a cause depending; for writs, pleas, trials, judgments. Some-

[a] Madox Excheq. 293.

times

times part of the debt in conteſt was proffered to the crown for a favourable deciſion. Thus was the common courſe of juſtice made liable to the interference and controul of royal authority.

THIS is only one inſtance, among many others, of the ſcope given to the exerciſe of ſupreme authority, while the ſtate of our law was ſo unſettled, and its efforts ſo feeble. Beſides the uncertain condition of our legal polity, other cauſes, rooted in the conſtitution of the government, contributed to arm the king with extraordinary powers. The ſtrict feudal ſubmiſſion of a vaſſal to his liege lord encouraged the notion of an entire obedience in all things to the king, who being ſupreme over all the lords in his kingdom, was, of courſe, to ſurpaſs them in the petty prerogatives which they themſelves claimed within their own demeſnes. Theſe various cauſes concurring with the immenſe authority poſſeſſed by the firſt Norman king, enabled this race of monarchs to aſſume prerogatives, and exerciſe acts of ſovereignty, to the laſt degree oppreſſive and tyrannical.

BESIDES the exertions of prerogative, the law itſelf, which had been framed under ſo baneful an influence, was arbitrary and cruel. *Tenures* and the *foreſt laws* were the ſource of endleſs jealouſies and diſcontents, and occaſioned moſt of the public diſorders, which broke out with ſuch violence in theſe times. The foreſt laws were firſt introduced by the Conqueror, to protect his favourite diverſion of hunting. It was not ſufficient that this mighty hunter aſſigned certain tracts of land, the property of his ſubjects, to be converted into foreſt; that he diſpeopled and made deſolate whole diſtricts of cultivated country; but, to ſecure the full enjoyment of it, he cauſed regulations to be framed, calculated to reſtrain and puniſh with ſeverity every minute invaſion of this new inſtitution. The œconomy of the foreſt occaſioned a number of grievous penalties: offences reſpecting vert and veniſon were puniſhed with

with barbarous mutilations; and other delinquencies with fine and imprisonment. A regular series of courts was erected to be held at stated periods; in one of which the judges obtained the distinguished style of *Justices in Eyre*.

The fruits and consequences of the feudal constitution made another, and no small part of the grievances then complained of, and were borne with great impatience by both people. The English, who had voluntarily consented to the introduction of tenures, principally as a fiction affording a basis for a national militia, ill endured the oppressive conclusions drawn from that establishment; conclusions which, with respect to them, had no foundation in reason or truth. Possessed of their land long before William entered the country, they revolted with indignation at the obligations by which they were now said to be bound to their lords. Feeling the burthens of this new state, they sighed after that freedom which they had enjoyed under their Saxon kings; and, in their discourses with the Normans, instilled into them a persuasion, that other conditions of society, and other institutions than those which they laboured under, would consist with a well-ordered government. Nor were the Normans themselves satisfied with the increasing burthens of their own polity, which had accumulated much beyond their original design in establishing it. It was little recompence to a great lord, that he could exercise the like sovereignty over his tenants which he himself suffered from the king; while the rear vassals, who were mostly English, without any power to compensate themselves, were in a state of society truly deplorable. These considerations united the nation in a common cause. The cry was for a restoration of the laws of Edward the Confessor, as a concise way of repealing all the late innovations.

The charters.

But the abolition of a system to which the kingdom had conformed for some years, could hardly be obtained; to procure some alterations that would temper and abate the

the extreme evils complained of was as much as could be expected. This was done by *charters* granted by several of our kings.

HENRY I. being poſſeſſed of the throne by a precarious title, endeavoured to conciliate the people by conceſſions of this kind. A formal charter was ſigned by the king. In this he abrogated, in general words, all abuſes that had lately crept in; and declared, that no reliefs ſhould be taken but ſuch as were juſt and lawful. He diſclaimed any right to exact money from his barons for licence to marry their daughters, or other females; and engaged to give all female wards in marriage by the advice of his barons. The dower of widows was ſecured; and the king engaged not to give them in marriage without their conſent. The widow or ſome other relation was to have the cuſtody of the lands and perſons of their children. All barons were enjoined to act in the like manner towards their vaſſals.

HAVING made theſe, with other ordinances relating to crimes and puniſhments, he expreſsly confirmed the laws of Edward the Confeſſor, *cum illis emendationibus quibus pater meus eas emendavit concilio baronum ſuorum* [b]. Thus were ſome branches of the feudal law, in a degree, checked in their growth, while, the body remained firmly rooted and flouriſhing.

THIS charter was confirmed by Stephen [c], who granted another, merely to ſecure the liberties of churchmen; to which order he had been moſtly indebted for the poſſeſſion of the crown [d]. The charter of Henry I. was alſo confirmed by Henry II. [e].

THIS charter, however, did not reach all the miſchiefs that prevailed in the kingdom; nor were the proviſions which it did contain faithfully obſerved. They, with all the rights of the people, were trampled on by ſucceed-

[b] Blac. Tracts, vol. 2. p. 8.
[c] Ibid. p. 9.
[d] Ibid. p. 10.
[e] Ibid. p. 11.

ing

ing monarchs. The unſtable nature of government in theſe times made the condition of the people depend very much on the character of their kings; a circumſtance which was happily experienced in the reign of John. With all that violence which hurried him on to ſport with the liberties of a people, this prince wanted the firmneſs neceſſary to command reſpect and obedience; and while he excited their reſentment by a wantonneſs of tyranny, he encouraged their reſiſtance by his puſillanimity. Exaſperated at repeated inſults, his barons aſſembled, and with arms in their hands demanded of him a charter which might ſecure their property and perſons from future invaſions of power. A convention was ſoon held between the king and his people in an open field, called Runnymede, near Staines, in all the terrors of martial preparation. The king encamped, with ſome few adherents, on one ſide; the barons on the other. After ſome days of debate and conſideration, the barons drew up a ſet of *capitula*, containing the heads of grievances, grounded upon the charter of Henry I. Theſe, with ſome ſmall qualifications to which they acceded, were then thrown into the form of a charter; to which the king affixed his ſeal.

THIS charter of king John, uſually called *Magna Charta*, and the *Charter of Liberties*, is more full and explicit than that of Henry I. In this reliefs were fixed at a certain ſum; many regulations were made concerning wardſhip and marriage, the rights of perſons, and the adminiſtration of juſtice; all which will be conſidered in the ſucceeding reign, when *Magna Charta* was confirmed, with ſome alterations, by Henry III.: this of Henry III. being the Great Charter, which is always referred to as the baſis of our law and conſtitution; while the charter of John is only remembered as a monument of antiquity. One very ſtriking proviſion of John's charter, which is omitted in that of Henry III. deſerves our notice. It is there declared, that no ſcutage or aid ſhall

CHAP. IV. WILLIAM the CONQUEROR to JOHN.

be levied on the ſubject *niſi per commune concilium regni noſtri;* except in the three caſes in which a feudal lord was entitled to the aſſiſtance of his vaſſal; namely, on marriage of his daughter, on making his ſon a knight, and to redeem his perſon from captivity; a reſtriction that was declared by the charter to hold good, not only between the king and his tenants, but between every lord and his tenants. In order to aſſemble the *commune concilium regni* to aſſeſs ſuch ſcutages and aids, the king engaged to ſummon all archbiſhops, biſhops, abbots, earls, and greater barons, *ſigillatim per literas*; *et præterea*, ſays he, *faciemus ſummoneri in generali per vicecomites, et ballivos noſtros, omnes illos qui de nobis tenent in capite*; a paſſage that ſeems, beyond all controverſy, to point out the conſtituent members of the great council of the kingdom in thoſe days.

SEVERAL originals of this charter were executed by the king. It is ſaid that one was depoſited in every county, or at leaſt in every dioceſe. In purſuance of one of the proviſions in the charter, twenty-five barons were elected as guardians of the liberties of the people, who were to ſee the contents of it properly executed; but the troubles that ſoon followed, from the want of faith in the king, prevented this ſcheme of reformation. The king died in the next year, and left the kingdom in all the horrors of a civil war.

Characters of theſe kings, as legiſlators.

WE ſhall now conſider the kings whoſe reigns fall within this period, in their character as legiſlators. We have before ſeen, that William the Conqueror, beſides confirming the laws of the Confeſſor, made ſome himſelf, which effected no inconſiderable alteration, by introducing tenures, and the trial by duel in criminal queſtions. Beſides theſe expreſs ordinances, he contrived all means of ingrafting the laws of Normandy upon the common law: for this purpoſe, he appointed all his judges from among his Norman ſubjects, and made that language be taught in ſchools.

ſchools[z]. By the conſtitution of his courts of juſtice, and every act of his adminiſtration, he did all in his power to change the juriſprudence of the country.

We hear nothing of Rufus as a legiſlator; nor are there any laws of Henry I. except his charter; but there is every reaſon to believe that the latter of theſe princes paid great regard to the improvement of the law. He was himſelf a man of learning, and had a diſpoſition to quiet the minds of his ſubjects by a good adminiſtration; the laws, therefore, which go under his name may be conſidered as a compilation, at leaſt, made in his reign, and as an inſtance of his attention to the ſubject of legiſlation.

The reign of Stephen was a period of continual war and diſturbance, and of courſe gave little room for improvement in legal eſtabliſhments. The introduction, however, of the books of canon and civil law muſt have contributed to the great advances made in the time of his ſucceſſor, Henry II.; for though there was always an extreme jealouſy in the practiſers of the common law, with reſpect to thoſe two ſyſtems, it went no further than to an excluſion of their authority as governing laws: they were ſtill cultivated by them as branches of the ſame ſcience, and had a great effect in poliſhing and improving our municipal cuſtoms.

The wiſe adminiſtration of Henry II. operating on the advantageous circumſtances concurring in the latter end of his reign, when all things were reduced to peace, contributed more to advance our legal polity than all the preceding times from the Conqueſt put together. Without recapitulating what has been before related, let any one compare the work of Glanville with the laws (or, as it might more properly be called, *the treatiſe of law in the time*) of Henry I. the great regularity in the order of proceeding, and the refinement with which notions of property

[z] Wilk. Leg. Sax. p. 289.

are treated, and he will see the superiority of the later reign in point of knowledge. It is probable, that the additions and amendments made in the law of this kingdom were by this prince transplanted into Normandy, and occasioned a still further improvement in the law of tenures; as lawyers were, by these communications, engaged in a kind of competition to enlarge and polish the same subject of enquiry. The whole of our municipal law was improved to a high degree during the reign of Henry II. and afforded an ample foundation for the superstructure raised on it in the time of Richard and John, and more particularly in the reign of Henry III.

It does not appear, that Richard took any part himself in contributing to further the great designs of his father, in matters of municipal regulation, but left things to the course they had been put in by him. This prince, however, stands very high in the history of maritime jurisprudence. Upon his return from the Holy Land, while he was in the Island of Oleron, on the coast of France, he compiled a body of maritime law. This was designed for the keeping of order, and the determination of controversies abroad; and the wisdom with which it was framed, has been evinced by the general reception it has obtained in other nations[g]. King John did nothing memorable in the way of legislation in this kingdom; though he has the praise of having first introduced the English laws into Ireland, where he instituted sheriffs and other officers to interpret and execute them. He likewise appointed a grand justiciary to preside over the administration of justice in that kingdom[h].

The monuments which remain of the jurisprudence of these times are not very numerous. They consist of some laws, charters, records, and law-treatises.

[g] Black. vol. iv. p. 423.

[h] Tyrr. vol. ii. p. 809.

Of

Laws of William the Conqueror.

Of the laws of William the Conqueror, ſome are in Norman-French, and ſome in Latin. The firſt fifty *capitula* in Norman-French are what, Ingulphus ſays, he brought down to his abbey of Croyland, as thoſe which the king had confirmed and commanded to be obſerved throughout England [i]. Though the time when they were enacted is not mentioned, it is tolerably clear, that it was not long after Ingulphus went to London on the affairs of his monaſtery, in the ſixteenth year of William's reign. Theſe therefore were, probably, ſuch alterations and additions as he choſe to make in the laws of Edward, which had been allowed in the fourth year of his reign [k]. There follow ſome other laws of William in the form of a charter; and as the firſt moſtly concern the criminal code, theſe latter conſtitute ſome alterations in the civil. Theſe are in Latin, and go from the fifty-firſt chapter to the ſixty-ſeventh inclusive. There are alſo ſome others in the form of a charter, which, together with the preceding, make, in all, eighty-one *capitula* of laws of William the Conqueror.

There are no laws remaining of William Rufus, if any were made; nor of Henry I. excepting his charter. Thoſe that uſually go under the title of laws of this king, and are entered in the Red Book of the exchequer, ſeem to have been reduced into that form by ſome perſon of learning, as containing a ſketch of the common law then in uſe; a manner of entituling treatiſes not then uncommon; for there is now to be ſeen, in the Cottonian collection, a manuſcript of Glanville, which bears the title of *Laws of Henry II.* [l] There is no evidence that theſe laws were enacted by the great council, or granted by any charter. They contain ninety-four *capitula*, and are to be found in the collection of *Lambard* and *Wilkins*.

We have no remains of legiſlation in the time of Stephen. The laws of Henry II. are the Conſtitutions made

[i] Ingulph. [k] Tyrr. vol. ii. p. 60. [l] Claud. D. 2.

at

at *Clarendon*, anno 1164, and the ſtatutes made at *Northampton*, anno 1176. The firſt fourteen of the Conſtitutions of Clarendon made ſeveral alterations in the civil and criminal part of our laws; the remaining ſixteen concern eccleſiaſtical affairs, and contain thoſe points which were diſputed between Henry and Becket, and between this kingdom and the ſee of Rome.

BESIDES laws, there remain ſome public acts of this reign: as, *articles of enquiry concerning the extortion and abuſes of ſheriffs*, and *the aſſiſe of arms*. During the reigns of Richard and John, there are no laws which can be properly ſo called; but there are commiſſions and ordinances of a public nature reſpecting the adminiſtration of juſtice. In the reign of the former there are ſome *articles of the crown*, with the *forms of proceeding in thoſe pleas*; and *directions for preſerving the laws of the foreſt* [m].

BESIDES the laws of theſe kings which have been mentioned, there are many other proviſions made in theſe reigns, which may be found, arraigned in the order of time in which they paſſed, in the *Codex Legum Veterum* intended for publication by Spelman, and now annexed to the end of Wilkins's Anglo-Saxon Laws [n].

THE great monuments of this period are the *charters*. Under this title might indeed be reckoned thoſe laws of William the Conqueror, which we have juſt noticed to have paſſed in that form. But the charters, properly ſo called, and which have become ſo famous on account of the object they all had in view, namely, the removal and redreſs of certain grievances, are the following: The charter of Henry I. containing eighteen chapters; that of Stephen, containing thirteen chapters; that of Henry II. containing only two chapters, and expreſſed in very general terms; the *Capitula Baronum*, being thoſe heads of grievances which were propoſed by the barons to John to

[m] Tyrr. vol. ii. p. 578 [n] See the Preface to Wilk. Ang. Sax. Laws.

be

be redreſſed; and the *Magna Charta* of that king, drawn up in purſuance of them: theſe are all to be found in the late Mr. Juſtice Blackſtone's correct edition of the charters[o], where that great ornament of Engliſh law has given a critical and very curious hiſtory of theſe valuable remains of antiquity.

Of the ſtatutes.

THE laws, or *aſſiſæ*, as they were called, made at this early period, deſerves a little further conſideration. It has been before obſerved, that our law is compoſed of the cuſtom of the realm, or *leges non ſcriptæ*, and the ſtatutes, or *leges ſcriptæ*. Our lawyers have made a diſtinction among ſtatutes themſelves; they have diſtinguiſhed between ſtatutes made before the time of memory, and thoſe made ſince. The *time of memory* has been fixed in conformity with a proviſion made in the time of Edward I. for ſettling the limitation in a writ of right; which was, by ſtat. 1 Weſt. c. 39. fixed at the beginning of the reign of *Richard*. Though the limitation in a writ of right has been ſince altered, this period has been choſen as a diſtance of very high antiquity, at which has been fixed *the time of memory*, as it is called; ſo that every thing before that period is ſaid to have happened before the time of memory.

THOSE ſtatutes which were made before the time of memory, and have not ſince been repealed nor altered by contrary uſage, or ſubſequent acts of parliament, are conſidered as a part of the *leges non ſcriptæ*; being, as it were, incorporated into, and become a part of, our common law: and notwithſtanding copies of them may be found, their proviſions obtain at this day, not as acts of parliament, but by immemorial uſage and cuſtom; of which kind is, no doubt, a great part of our common law[p].

LAWS were termed ſometimes *aſſiſæ*, ſometimes *conſtitutiones*. Though the moſt ſolemn and uſual way of ordain-

[o] Black. Tracts, vol. ii. [p] Hale Hiſt. 3, 4.

ing

ing laws was to get the concurrence of the *commune concilium regni*, it should seem, that in these times the king took upon himself to do many legislative acts, which, when conformable with the established order of things, were readily acquiesced in, and became the law of the land. The very frame, indeed, of such laws as were sanctioned with all possible formalities, carried in them the strongest appearance of regal acts: if a law passed *concilio baronum suorum*, it was still *rex constituit*. Of the laws of William the Conqueror, though in some parts they seem to have the authority of the great council, *statuimus*, *volumus*, *præcipimus*; yet in others they speak of the person of the king only, *hoc quoque præcipio, et prohibeo*[q]. The form of a charter, in which the king is considered as a person granting, was a very common way of making laws at this time; and this carries in it the strongest proof of the sentiments entertained in those ages concerning legislation: nevertheless it is to be remarked, that some of these charters, from the solemnities attending the execution of them, might be regarded as having all the validity of laws; as the charter of king John, to which the barons of the realm were parties. There were, however, several other charters which seem to have no authority but that of the sovereign. Indeed several laws, or *assise*, even so low down as Henry II. and the reigns of Richard and John, vouch no other sanction but *rex constituit*, or *rex præcepit*, for every thing they command or direct.

THERE is no way of accounting for this extraordinary appearance of the old statutes, but by supposing the state of our constitution and laws to have been this: That the judicature of the realm being in the hands, and under the guidance of the king and his justices, it remained with him to supply the defects that occasionally appeared in the course and order of proceeding; which being founded ori-

[q] Wilk. 217, 218.

ginally

ginally on cuſtom and uſage, was, in its nature, more ſuſceptible of modification than any poſitive inſtitution, that could not be eaſily tampered with, without a manifeſt diſcovery of the change. In an unlettered age, it was convenient and beneficial that the king ſhould exerciſe ſuch a ſuperintendance over the laws, as to declare, explain, and direct, what his juſtices ſhould do in particular caſes; ſuch directions were very readily received as poſitive laws, always to be obſerved in future; and, no doubt, numbers of ſuch regulations were made, of which we have at preſent no traces. While this ſupreme authority was exerciſed only in furtherance of juſtice, by declaring the law, or even altering it, in inſtances which did not much intrench upon the intereſt of the great men of the kingdom, it was ſuffered to act at freedom. But no alteration in the law which affected the perſons or property of the barons, could be attempted with ſafety, without their concurrence in the making of it; as, indeed, it could not always be executed without the aſſiſtance of their ſupport. Thus it happened, that when any important change was meditated by the king, a *commune concilium* was ſummoned, where the advice of the *magnates* was taken; and then the law, if paſſed, was mentioned to be paſſed with their concurrence. On the other hand, had the nobles any point which they wanted to be authoriſed by the king's parliamentary concurrence, a *commune concilium* was called, if the king could be prevailed on to call one; and if the matter was put into a law, the king here was mentioned to have commanded it, at the prayer and requeſt of his barons; ſo that, one way or other, the king is mentioned in all laws as the creative power which gives life and effect to the whole.

As laws made in the ſolemn form by a *commune concilium* were upon points of great importance, and often the ſubjects of violent conteſt; they were in the nature of concords or compacts between the parties intereſted, and were ſometimes

ſometimes paſſed and executed with the ceremonies ſuitable to ſuch a tranſaction. The Conſtitutions of Clarendon (which too were called the ancient law of the kingdom, and therefore only to be declared and recognized as ſuch), were paſſed in that way. Becket and all the biſhops took an oath to obſerve thoſe laws; and all, except Becket, ſigned, and put their ſeals to them. The laws were drawn in three parts. One counterpart, or authentic copy, was given to Becket, another was delivered to the archbiſhop of York, a third was retained by the king himſelf, to be enrolled among the royal charters[r]. The *Magna Charta* of king John was executed with ſimilar ſolemnity, and bore a ſimilar appearance of a compact between the king and his nobles. It was not uncommon that the people, as well as the makers, ſhould be ſworn to obſerve laws; the *aſſiſæ ſtatutæ, et juratæ*, are mentioned by Bracton as an article of enquiry before the juſtices in eyre in the reign of Henry III.

THE *rotuli annales*, or *great rolls of the pipe*, in which the accounts of the revenue were ſtated, are the moſt antient rolls now remaining, and the ſeries of them is perfect from the firſt year of Henry II. Beſides this there is ſtill remaining in the ſame archives, a *great* or *pipe roll*, which has been ſuppoſed to belong to the *fifth year of king Stephen*, but has been proved by Mr. Prynne and Mr. Madox to be intitled to an earlier date; indeed, to belong to ſome year of Henry I.; and, according to Mr. Prynne, to the 18th of that king.

Domeſday Book

THE plea rolls of the Exchequer, now remaining, do not begin till the reign of Edward I. The oldeſt rolls of the *curia regis* now extant begin with the firſt year of Richard I. as do the *aſſiſe rolls* of the juſtices itinerant. Thoſe of the *bancum* begin with the firſt year of king John, which is very near the firſt eſtabliſhment of that court. There are

[r] Litt. Hen. II. vol. iv. p. 26. [s] Mad. Hiſt. Diſ. Epiſt.

*charter*

*charter rolls* of the chancery, of the first year of king John, and *close rolls*, *fine rolls*, *patent rolls*, *liberate rolls*, and *Norman rolls*, of the second, third and sixth year of that king. All the before-mentioned rolls, except the *great rolls of the pipe*, are said to be now in the Tower of London, and are the earliest specimens of records that have been spared by the joint destruction of time, wilfulness, and neglect. The cruel havock made by these enemies, has occasionally excited a temporary attention to this important article, and measures have, in consequence, been pursued for preserving such muniments as remained. Such events, in the history of our records, will be mentioned in their proper places*.

AMONG the records and valuable remains of antiquity we must not forget the famous *Domesday Book*, which, though not strictly a monument of a legal nature, yet has this connexion with the History of our Law, that it is said to have been made with a view to the establishment of tenures. This book contains an account of all the lands of England, except the four northern counties; and describes particularly the quantity and value of them, with the names of their possessors. King Alfred is said to have composed a book of this kind about the year 900, of which this was in some measure a copy. This work was begun in 1080, and completed in six years. It has always been esteemed of the highest authority, in questions of tenure; and is considered by antiquarians as the most antient and most venerable record that now exists in this or any other kingdom. The *Black* and *Red Book of the Exchequer*[a] seem very little more connected with our antient

* See Ayloffe's Ancient Charters, Introd.

[a] Domesday Book is a document belonging to the Receipt of the King's Exchequer, and is in the Chapter-house at Westminster. It is in two volumes. For a more satisfactory account of this antient record we must refer the Reader to a small quarto pamphlet, intitled, *A short Account of some Particulars concerning Domesday Book, with a View of its being published. By a Member of the Society of Antiquarians.* This is a performance of Mr. Webb, and was read at the Society in the year 1755.

In

cient laws than the foregoing work, except that in both of them was found a tranſcript of a law-treatiſe, which will be mentioned preſently.

THERE are two treatiſes written in the reign of Henry II. which contribute greatly to illuſtrate the ſtate and hiſtory of our law: the one is the *Dialogus de Scaccario*[t] before alluded to; the other is the *Tractatus de Legibus Angliæ*, by *Glanville*.

THE *Dialogus de Scaccario*, has generally paſſed as the work of *Gervaſe of Tilbury*; but Mr. Madox thinks it was written by Richard Fitz-Nigel biſhop of London, who ſucceeded his father in the office of treaſurer, in the reign of Richard I. and was therefore well qualified for ſuch an undertaking. This book treats, in the way of dialogue, upon the whole eſtabliſhment of the exchequer, as a court and an office of revenue; giving an exact and ſatisfactory account of the officers and their duty, with all matters

In this little eſſay is brought together in one view all that had been ſaid by former hiſtorians and antiquarians on the ſubject of Domeſday.

By the munificence of parliament, *Domeſday* has juſt been printed; but we muſt regret that this laudable regard of the legiſlature towards our antient records has not been ſeconded by the common attention which has been paid to every other publication ſince the earlieſt times of printing. The reader will be ſurpriſed when he is told, that this book has no prefatory diſcourſe, or index, not even a title-page, or the name of the printer; it is a mere *fac-ſimile*, conſtituting a very large folio, full of abbreviations and ſigns, that cannot be underſtood without a key, and much previous information.

[t] *Liber Ruber* and *Liber Niger Scaccarii* are two miſcellaneous collections of charters, treatiſes, conventions, the number of hides of land in ſeveral counties, eſcuages, and the like; many of which, as well as the *Dialogus de Scaccario*, are to be found in both thoſe books. The *Liber Niger* has been printed by Hearne, together with ſome other things, in two volumes 8vo; of which the *Liber Niger* fills about 400 pages. He intitles it, *Exemplar vetuſti codicis MS. (nigro velamine cooperti) in Scaccario, &c.* The collector of the contents of the *Liber Ruber* is ſuppoſed by Mr. Madox to have been *Alexander de Swereford*, archdeacon of Shrewſbury, and an officer in the Exchequer in the latter end of Henry II.

It ſeems as if the *Dialogus de Scaccario* had been conſidered as the whole of the *Liber Niger*, till the publication of Hearn; and ſince Mr. Madox has pronounced Richard Fitz-Nigel to be the author of the Dialogue, and not Gervaſe of Tilbury, the whole of the *Liber Niger* has been given to Gervaſe, though it does not appear for what reaſon. The *Dialogus de Scaccario* is publiſhed by Mr. Madox, at the end of his Hiſtory of the Exchequer. See Nicholſon's Eng. Hiſt. lib. p. 173. Hearn's *Liber Niger*, p. 17.

concerning

concerning that court, during its higheſt grandeur, in the reign of Henry II. This is done in a ſtyle ſomewhat ſuperior to the law-Latinity of thoſe days.

Glanville.

GLANVILLE's book is of a very different ſort: this is written without any of the freedom or elegance diſcoverable in the other; and has all the formality and air of a profeſſional work. It is entitled, *Tractatus de Legibus et Conſuetudinibus Regni Angliæ;* but, notwithſtanding this general title, it is confined to ſuch matters only as were the objects of juriſdiction in the *curia regis*. Having ſtated this as the limit of his plan, the author very rarely travels out of it. Glanville's treatiſe conſiſts of fourteen books; the firſt two of which treat of a writ of right, when commenced originally in the *curia regis*, and carry the reader through all the ſtages of it, from the ſummons to the appearance, counting, duel, or aſſiſe, judgment and execution. In the third, he ſpeaks of vouching to warranty; which, being added to the two former books, compoſes a very clear account of the proceeding in a writ of right for recovery of land. The fourth book is upon rights of advowſon, and the legal remedies relating thereto. The fifth is upon actions to vindicate a man's freedom; the ſixth, upon dower. The ſeventh contains very little concerning actions; but conſiders the ſubjects of alienation, deſcent, ſucceſſion, and teſtaments. The eighth is upon final concords; the ninth, upon homage, relief, and ſervices; the tenth, upon debts, and matters of contract; and the eleventh, upon attornies. Having thus diſpoſed of actions commenced originally in the *curia regis*, in his twelfth book he treats of writs of right brought in the lord's court, and the manner of removing them from thence to the county court and *curia regis;* which leads him to mention ſome other writs determinable before the ſheriff. In his thirteenth book he ſpeaks of aſſiſes and diſſeiſins. The laſt book is wholly upon pleas of the crown.

THE

THE ſubject of this treatiſe is all along illuſtrated with the forms of writs; a ſpecies of learning which was then new; was, probably, brought into order and conſiſtency by Glanville himſelf; and firſt exhibited in an intelligible way, and with ſyſtem, in this book.

THE method and ſtyle of this work ſeem very well adapted to the ſubject: the former opens the matter of it in a natural and perſpicuous order; while the latter delivers it with ſufficient ſimplicity and clearneſs. The latinity of it, however, may not ſatisfy every taſte; the claſſic ear revolts at its ruggedneſs; and the curſory reader is perpetually impeded by a new and harſh phraſeology. But the language was not adopted without deſign; the author's own account of it is this: *ſtylo vulgari, et verbis curialibus utens, ex induſtriâ, ad notitiam comparandam eis, qui hujuſmodi vulgaritate minùs ſunt exercitati*[u]. The author ſeems not to be diſappointed in his deſign even at this diſtance of time; for a perſon who reads the book thro', cannot fail of finding in one place an explanation of ſome difficulty he may have met with in another: the recurrence of the ſame words and modes of ſpeaking makes Glanville his own interpreter. When the ſtyle of Glanville is maſtered in this way, it will appear that many obſcure ſentences have been rendered ſuch, through too great an anxiety to expreſs the author's meaning; and perhaps it will not be an affectation of diſcernment to ſay, that the plain Engliſh which it is thus attempted to convey, may be ſeen through the aukward dreſs which this Latiniſt has ſpread over it.

IF Glanville confines himſelf to a part only of our law, he treats that part with ſuch conciſeneſs, and ſometimes in ſo deſultory a way, that his book is to be looked upon rather as a compendium than a finiſhed tract; notwithſtanding which, it muſt be conſidered as a venerable monument of the infant ſtate of our laws; and as ſuch will always find reception with the juridical hiſtorian, when thrown aſide by the practiſing lawyer.

[u] Prolog. ad finem.

IT

IT has been a general perſuaſion, that the writer of this book was *Ranulphus de Glanvillâ*, who was great juſticiary to Henry II. This great officer, though at the head of the law, united in himſelf a political as well as a judicial character; and, it ſeems, that Glanville was likewiſe a military man, for he led the king's armies more than once, and was the commander who took the king of Scots priſoner. It might therefore be doubted, whether a perſon of this deſcription was likely to be the author of a law-treatiſe containing a detail of the practice of courts in conducting ſuits. There was a *Ranulphus de Glanvillâ* who was a juſtice itinerant [y], and who, it is ſaid, was a juſtice in the king's court towards the cloſe of this reign. If the author was really of this name, it may be doubted whether he was not the latter of theſe two perſons. Perhaps, after all, this work might be written by neither, but may be aſcribed to the great juſticiary for no other reaſon than becauſe he preſided over the law at the time it was written, and might be the promoter of the work, and patron to its author. Whatever doubt there may be concerning the author, there is no queſtion but it was written in the reign of Henry II. there are many internal marks to prove it to be of that period; and from one paſſage, it ſeems to have been written [z] after the thirty-third year of that king. If Glanville is the earlieſt writer in our law, from whom any clear and coherent account of it is to be gotten; this book is alſo ſaid to be the firſt performance that has any thing like the appearance of a treatiſe on the ſubject of juriſprudence ſince the diſſolution of the Roman empire [a].

WHEN this book is conſidered with a view to the progreſs of our law, it makes a remarkable event in the hiſtory of the new juriſprudence. Notwithſtanding the attempts of William the Conqueror to introduce the Norman laws,

[y] Vid. Leg. Ang. Sax.

[z] Glanv. lib. 8. c. 2, 3.

[a] Barr. Ant. Stat. This is not true if the *Decretum* is to be conſidered as a treatiſe; for Henry II. came to the crown in 1154, and Glanville being written after the thirty-third year of his reign, could not appear till 1187. Now the *Decretum* was publiſhed by Gratian in 1149.

and

and the tendency in the ſuperior courts to encourage every innovation of that kind, not much had yet been done of a public and authoritative nature to confirm that law in oppoſition to the Saxon cuſtoms. The laws of William, excepting thoſe concerning tenures and the duel, were in the ſpirit and ſtyle of the Anglo-Saxon laws; the ſame may be ſaid of thoſe which go under the name of Henry I. It is obſerved, that the Conſtitutions of Clarendon, made about the eleventh year of Henry II. are, in the ſcope of them, as well as the ſtyle and language, more entirely Norman, than any laws or public acts from the Conqueſt down to that time [b]. It was not, then, till the reign of this prince that the Norman law was completely fixed here; and when it was firmly eſtabliſhed by the practice of this long reign, and had received the improvements made by Henry, then was this ſhort tract drawn up for public uſe. It is probable this was done at the king's command, in order to perpetuate the improvement he himſelf had made, and to effect a more general uniformity of law and practice through the kingdom. The work of Glanville, compared with the Anglo-Saxon laws, is like the code of another nation; there is not the leaſt feature of reſemblance between them.

WHILE the Norman law was eſtabliſhing itſelf here, that nation gradually received an improvement of their own polity from us. The two nations had ſo incorporated themſelves, that the government of both was carried on upon the like principle, and the laws of each were reciprocally communicated; a conſequence not at all unnatural, while both people were governed by one prince. Much more had been done, of late, in this country than in Normandy, for the promotion of legal ſcience. It was not till after the publication of Glanville, and even of Bracton and Britton, that the Normans had any treatiſe upon their law. One was at length produced in the *Grand Coutumier*

[b] Mad. Exch. 123.

of

*of Normandy*[c]; a work so like an English performance, that should there remain any doubt of its being formed upon our models, there can be none of the great similarity between the laws of the two nations at this time.

THERE are some antient treatises and statutes in the law of Scotland, which bear a still nearer resemblance to our English law. The close agreement between Glanville and the *Regiam Majestatem* leaves no room to doubt that one is copied from the other; though the merit of originality between them has occasioned some discussion. An Essay has been written expressly on this subject, in which it is said to be clearly proved, by the internal evidence of the two books, that Glanville is the original. It is observed by that writer, that Glanville is regular, methodical, and consistent throughout; whereas the *Regiam Majestatem* goes out of Glanville's method for no other assignable reason than to disguise the matter, and is thereby rendered confused, unsystematical, and, in many places, contradictory[d]. To this observation upon the method of the *Regiam Majestatem* it may be added, that, on a comparison of the account given of things in that and in Glanville, it plainly appears, that the Scotch author is more clear, explicit, and defined; and that he writes very often with a view to explain the other, in the same manner in which the writer of our Fleta explains his predecessor Bracton. This is remarkable in numberless instances all through the book, and is perhaps as decisive a mark of a copy as can be. The

[c] The *Coustumier of Normandy*, according to Basnage, could not have been composed till the reign of Philip the Hardy, who came to the throne in 1272, and reigned fifteen years; and our Edward I. came to the throne in 1272. Upon this statement of dates, it is possible that it might be written after the time of Britton. The language seems to have a more modern form than that of Britton; though this must be attributed to some other cause than such a small space of time as could by any possibility intervene between the writing of these two books. *Oeuvres de Henri Basnage, Avertissement.*

[d] The Essay here alluded to is written by Mr. Davidson, of Edinburgh. Of this Tract I have not been able to get a sight, and am obliged to the preface to the new edition of Glanville for this account of it.

other Scotch laws, which follow the *Regiam Majeſtatem* in Skene's collection, contribute greatly to confirm the ſuſpicion. Theſe, as they are of a later date than ſeveral Engliſh ſtatutes which they reſemble, muſt be admitted to be copied from them; and ſo cloſely are the originals followed, that the very words of them are retained. This is particularly remarkable of the reign of Robert II. in which is the ſtatute *quia emptores*, and others, plainly copied from our laws, without any attempt to conceal the imitation. Theſe laws, at leaſt, can impoſe upon no one; and when viewed with the *Regiam Majeſtatem* at their head, and compared with Glanville and the Engliſh ſtatute-book, they ſeem to declare very intelligibly to the world, that this piece of Scotch juriſprudence is borrowed from ours[e].

THE *Regiam Majeſtatem* is ſo called, becauſe the volume opens with thoſe words: the prologue to Glanville begins *Regiam Poteſtatem*. This whim of imitation is diſcoverable among our own writers. *Fleta* begins his Proœmium in the ſame way, and goes on, for ſeveral lines, copying word for word from Glanville. Indeed, the leading idea, in all, is taken from the Proœmium to Juſtinian's Inſtitutes.

[e] It ſeems unneceſſary to contend for the originality of the *Regiam Majeſtatem*, while a doubt of much more importance remains unſettled: this is, whether that treatiſe, as well as the others in the publication of *Skene*, are now, or ever were, any part of the law of Scotland. Upon this point, ſome of the moſt eminent Scotch lawyers are divided. We find *Craig* and *Lord Stair* very explicit in their declarations againſt theſe laws, as a fabrication, and palpable impoſition; on the other hand, *Skene* the editor is followed, among others, by *Erſkine*, *Lord Kaims*, and *Dalrymple*, who continually refer to them, as comprizing the genuine law of Scotland in former times. That a large volume of laws, and law treatiſes, ſhould be pronounced by perſons of profeſſional learning to be part of their law and cuſtoms, and ſhould be as poſitively rejected by others, is a very ſingular controverſy in the juridical hiſtory of a country; nor is it leſs ſingular, that this volume ſhould bear ſuch a cloſe ſimilitude with certain laws of a neighbouring ſtate, whoſe legiſlature had no power to give it ſanction and authority. While a fact of this ſort continues unaſcertained, the hiſtory of the law of Scotland muſt be involved in great obſcurity. See Craigii Inſt. Feud. lib. 1. tit. 8. ſect. 7. Stair's Inſt. fo. 3. tit. 4. ſect. 27. Skene's Preface to the Regiam Majeſtatem. Erſkine's Princ. Kaim's Hiſtorical Law Tracts; and Dalrymple's Feudal Property *paſſim*.

THE law-language of these times was *Latin* or *French*, but more commonly the former. The only laws of this time now subsisting in Norman-French, are those which compose the first collection of William the Conqueror. All the other laws from that time to the time of Edward I. are in Latin. There are some few charters of the first three Norman kings which are either in Anglo-Saxon or in Latin, with an English version; of which sort there are several now remaining in the Cottonian and other collections[f].

WITHOUT doubt the Norman laws of William were proclaimed in the county court in Anglo-Saxon, for the information of the English, who still continued to conduct business there in their own language, as they did in all inferior courts: but in the *curia regis* and *ad scaccarium* William obliged them to plead in the Norman tongue, as most consistent with the law there dispensed, and that which was best understood by the justices. However, notwithstanding this language was used in pleading and argument, all proceedings there, when thrown into a record, were inrolled in a more durable language, the Latin. This was the language in which all writs, laws, and charters, whether public or private, were drawn: so that the Norman tongue was of no extensive use here; nor was it till the time of Edward I. that French became of common use in the laws, parliamentary records, and law-books; and this was not the provincial dialect of Normandy, but the language of Paris.

Miscellaneous facts.

IT is believed that few were learned in the laws before the Conquest, except the clergy. The warlike condition in which that people lived, and the extreme ignorance which universally prevailed among the laity, left very little ability for the management of civil affairs to any but the clergy, who possessed the only learning of the times; in the reign

[f] Tyrrell, ii. 101.

therefore of the Conqueror, in the great cauſe between *Lanfranc* and *Odo* biſhop of Baieux, it was *Agelric* biſhop of Chicheſter to whom they looked for direction. He was brought, ſays an antient writer[g], in a chariot, to inſtruct them in the antient laws of the kingdom, *ut legum terræ ſapientiſſimus*. It was the ſame long after the Normans ſettled here.

In the time of Rufus, one Alfwin, rector of Sutton, and ſeveral monks of Abingdon were perſons ſo famous for their knowledge in the laws, that they were univerſally conſulted, and their judgment frequently ſubmitted to by perſons reſorting thither from all parts[h]. Another clergyman, named *Ranulph*, in the ſame reign obtained the character of *invictus cauſidicus*. So generally had the clergy taken to the practice of the law, at that time, that a cotemporary writer ſays, *nullus clericus niſi cauſidicus*. The clergy ſeem to have been the principal practicers of the law, and were the perſons who moſtly filled the bench of juſtice.

[g] Textus Roff. [h] Dug. Orig. p. 21.

CHAP.

## CHAP. V.

## HENRY III.

*Magna Charta—Tenures—Alienation—Mortmain—Communia Placita non ſequantur Curiam noſtram—Juſtices of Aſſiſe—Amercements—Nullus liber homo, &c.—Præcipe in Capite—Sheriff's Criminal Judicature—The Writ de Odio et Atiâ—Charta de Foreſtâ—The Judicature of the Foreſt—Puniſhments—Charters confirmed—Statutum Hiberniæ—Statute of Merton—Of Commons—Of Special Baſtardy—Ranks of Perſons—Of Villenage—Of Free Services—Of Serjeanty—Scutagium—Homage and Fealty—Of Wardſhip and Marriage—Of Gifts of Land—by whom—to whom—Of Simple Gifts—Of Conditional Gifts—Eſtates by the Courteſy—Of Reverſions—Gifts ad Terminum—Livery—Rights—Teſtaments—Eccleſiaſtical Juriſdiction therein—Of Deſcent—De Partu Suppoſito—Of Partition—Dower.*

CHAP. V. HENRY III.

HAVING travelled through the early periods of our law, through the profound darkneſs of the Saxon times, and the obſcure miſt in which the Norman conſtitutions are involved, we approach the confines of known and eſtabliſhed law. In the reign of Henry III. begins the order of ſtatutes on which legal opinions may be founded with certainty. Whatever ſtatutes were paſſed before this reign, and whatever remembrance we may have of them in annals and hiſtories of the time, they are conſidered as little more than the remains of antiquity, that illuſtrate indeed the enquiries of the curious, but add nothing to the body of legal learning. *Magna Charta*, and the

the ſtatutes of Merton and Marlbridge, paſſed in this reign, lie within the pale of the Engliſh law, as now underſtood; and furniſh topics for argument, and grounds for judicial deciſion. From this time, the hiſtory of our law becomes more authentic and certain. The conſtitutions now made, produced determined effects; we can trace in what manner they were afterwards altered and modified; can generally fix the æra of ſuch alterations; and can always reſt ſecure in the probability of our deductions, while we behold the conſequences of them in the preſent ſtate of our law.

If the ſtatutes furniſh authentic documents on which we may rely with confidence, the grounds and principles of the law are inveſtigated and diſcuſſed by an author of this reign, whoſe work may be conſidered as the baſis of all legal learning: the treatiſe of Bracton will enable us to ſpeak decidedly and fully upon every title in the law, whether civil or criminal. The ſketch we have juſt given from Glanville will now be filled up, and its deficiencies ſupplied; many of the obſcure hints, the doubts, and ambiguities with which that author abounds, will be elucidated; and the whole of our law explained with conſiſtency, and upon undeniable authority. Theſe are the materials from which the juridical hiſtory of this king's reign is to be collected. For the matter which they furniſh, it may not be raiſing the expectations of the reader too high, to promiſe him a full gratification of his thirſt for legal antiquities, and the knowledge of judicial proceedings in all their branches. It is rather to be feared, that every one may not intirely aſſent to the reaſons which induced us to enter ſo minutely into the detail of things; it is thought, however, that it would be leſs pardonable to give a ſcanty relation, where the ſort of information which is moſt likely to engage the curioſity of a lawyer depends, very often, upon circumſtances and paſſages apparently trifling.

THE reign of this king, and the remainder of this Hiſtory, will be divided, conformably with the nature of the materials from which it is formed, into the alterations made by ſtatute, and thoſe made by uſage and the deciſions of courts. Theſe two ſources of variation will be purſued ſeparately, and the amendments made by either ſtated diſtinctly, and by themſelves. We ſhall firſt conſider the ſtatutes, and then the deciſions of courts. In the preſent reign, we begin with *Magna Charta*, 9 Hen. III. that being the earlieſt ſtatute we have on record.

HENRY III. in the firſt year of his reign, on the 12th of November 1216, being then only nine years old, by the advice of Gualo the pope's legate and of the earl of Pembroke, in the grand council of the realm renewed the Great Charter which had been granted by his father, together with ſuch alterations and amendments as the circumſtances of the times had made neceſſary. In the September or November following, a new *Magna Charta* was ſealed by the pope's legate and the earl of Pembroke, with ſeveral additional improvements, at which time the clauſes relating to the Foreſt were firſt thrown into a ſeparate charter, making the *Charta de Foreſtâ* [b].

WHEN the king was declared of age, it was thought that ſo important an act of his infancy as this, ſhould be confirmed; accordingly, in the ninth year of his reign he confirmed the act of the pope's legate and the earl of Pembroke; and granted *Magna Charta* and *Charta de Foreſtâ* in the form in which they had ſealed it, and as we now have them [c].

THUS was the text of *Magna Charta* and *Charta de Foreſtâ*, after many alterations, finally ſettled; nor has there in ſucceeding times been any amendment made therein. The ſolicitude of later ages was to obtain frequent confirmations, and a ſtrict obſervance of theſe grand

[a] 2 Bla. Tracts, ii. Intr. 42. [b] Ibid. p. 52. 60. [c] Ibid. p. 69.

pillars

pillars of our conſtitution; by occaſional interpretations to explain any difficulties which might appear in the conſtruction of them; and to enlarge the benefits they were deſigned to confer. What were the benefits, liberties, and advantages ſecured to the people by theſe famous charters, and what is the form and ſtyle in which they are conceived, it is now our buſineſs to enquire.

THE copy of *Magna Charta* in our ſtatute-book is taken from the roll of 25 Ed. I. and is only an *Inſpeximus* of the charter of the ninth of Henry III. ſo called from the letters patent prefixed in the name of Edward I. INSPEXIMUS *Magnam Chartam domini Henrici quondam regis Angliæ patris noſtri de libertatibus Angliæ, in hæc verba.* Then follows *Magna Charta* nearly in the form of that granted by Henry III.

MAGNA CHARTA contains fifty-ſeven chapters, compoſing a rhapſody of ordinances for the ſettling or amendment of the law in divers particulars at that time anxiouſly contended for. The whole is ſtrung together in a diſorderly manner, with very little regard to the ſubject matter. If we were to judge, from the face of the inſtrument itſelf, of the chief deſign of the barons in obtaining this charter, we might be inclined to think, that their great object was to aſcertain the ſervices and burthens ariſing from tenures; for the firſt ſix chapters are wholly confined to that ſubject, and many others relate incidentally to the ſame point; the conſequence of which is, that many parts of this famous charter have become obſolete, and, to a modern reader, almoſt unintelligible. Other parts of it, however, are extremely worthy of notice, even at this day; as they, at the time, contributed to confirm, if not eſtabliſh, certain branches of our juridical conſtitution; and, what is more important, to lay down certain general principles, which have had an extenſive influence on our law in all its branches ever ſince; as our civil liberty and private rights became thereby better defined, and were

conſidered

considered as settled on the firm basis of parliamentary recognition.

Magna Charta.

To explain in what manner this was done, it will be proper to state at length the substance of *Magna Charta*; which we shall attempt in an order differing from that in which the text appears, but which will, perhaps, bring the contents of it into a clearer light than the original appears in. We shall first speak of such provisions as are of a more general or miscellaneous nature; then of those which relate to tenures and property; after which will follow the regulations ordained for the administration of justice.

THE address and general preamble to the charter are deserving notice, as they shew the form in which these solemn acts were usually authenticated: it is addressed in the name of the king. "To all archbishops, bishops, abbots, priors, "earls, barons, sheriffs, provosts, officers; and to all bai- "liffs, and other our faithful subjects, who shall see this "present charter, greeting. Know ye, that we, unto the "honour of Almighty God, and for the salvation of the "souls of our progenitors and successors kings of England, "to the advancement of holy church, and amendment of "our realm, of our mere and free will[d], have given and "granted[e] to all archbishops, bishops, abbots, priors, earls, "barons, and to all freemen of this our realm, these liber- "ties following, to be kept in our kingdom of England "for ever."

SUCH is the manner in which the provisions of *Magna Charta* are introduced; after which comes the first chapter, containing a general grant in the following terms: "First, we have granted to God, and by this our present "charter have confirmed, for us and our heirs for ever, "that the church of England shall be free, and shall have "all her whole rights and liberties inviolable. We have "granted also and given to all the *freemen* of our realm,

[d] *Spontaneâ et bonâ voluntate nostrâ.* [e] *Dedimus et concessimus.*

"for

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" for us and our heirs for ever, theſe liberties under-
" written, to have and to hold, to them and their heirs, of
" us and our heirs for ever." What theſe liberties were we ſhall now enquire.

It was ordained, that the city of London ſhall have all the ancient liberties and cuſtoms which it had been uſed to enjoy; and that all other cities and towns, and the barons of the cinque or other ports, ſhould poſſeſs all their liberties and free cuſtoms [f]. As many exactions had been made during the reigns of Richard and John for erecting bulwarks, fortreſſes, bridges, and banks, contrary to law and right; it was declared, that [g] no town or freeman ſhould be diſtrained to make bridges or banks, but only thoſe that were formerly liable to ſuch duty in the reign of Henry II. a period which was often referred to, as an example for correction of enormities, and the due obſervance of the laws. For the ſame reaſon, none were to appropriate to themſelves a ſeveral right in the banks of rivers, ſo as to exclude others from a paſſage there, or from fiſhing, except ſuch as had that right in the reign of Henry II [h]. All weirs in the Thames and Medway, and all over England, were to be deſtroyed, except ſuch as were placed on the coaſt [i]. One ſtandard of weights and meaſures was eſtabliſhed [k] throughout the kingdom.

A PROVISION was made reſpecting merchant-ſtrangers, which evinces how very early a regard was had to the intereſts of trade. Before this, it ſhould ſeem, that merchant-ſtrangers, though in amity, uſed to be laid under certain prohibitions [l]; for it was now provided [m], that all merchants, unleſs they were before publicly prohibited, ſhould have ſafe and ſure conduct in the ſeven following inſtances: 1ſt, to depart out of England; 2dly, to come into Eng-

[f] Mag. Chart. ch. 9.
[g] Ch. 15.
[h] Ch. 16.
[i] Ch. 23.
[k] Ch. 25.
[l] 2 Inſt. 57.
[m] Ch. 30.

land

land; 3dly, to tarry here; 4thly, to go through England, as well by land as by water; 5thly, to buy and ſell; 6thly, without any manner of evil tolls; 7thly, by the old and rightful cuſtoms. But this was only while their ſovereign was in amity with our nation; for, in time of war, merchant-ſtrangers, being enemies, who were here at the beginning of the war, were to be attached, without harm of their body or goods, till it was made known to the king or his chief juſticiar [n] how our merchants were treated in the enemy's country, and they were to be dealt with accordingly.

THESE are the proviſions of the Great Charter that are not eaſily reducible to any of the following heads, to which we are now proceeding. We ſhall firſt ſpeak of the regulations relating to tenures. If any earl, or baron, or other perſon holding of the king in chief by knight ſervice, died, and at the time of his death his heir was of full age, it was ordained, that he ſhould have his inheritance upon paying the old relief; that is, the heir of an earl was to pay for his earldom 100l. the heir of a baron for his barony 100 marks, and the heir of a knight 100 ſhillings for every knight's fee; and ſo in proportion [o].

Tenures.

NOTWITHSTANDING theſe reliefs of baronies and earldoms are called the old relief, we have before ſeen, that in the time of Glanville ſuch reliefs were not fixed by law, but depended on the pleaſure of the prince, and therefore muſt have been a ground of continual diſcontent; the knight's relief here preſcribed is the ſame as it was in Glanville's time [p].

IN caſes where the heir was within age at the death of his anceſtor, it was provided [q], that the lord ſhould not have the ward of him, nor of his land, before he had taken homage of him. This was in confirmation of the common law ſtated by Glanville [r], and was

[n] *Capitali juſticiario noſtro.*
[o] Ch. 2.
[p] Vid. ant. 127.
[q] Ch. 3.
[r] Vid. ant. 129.

now

now enacted for better ſecurity of heirs againſt their lords; namely, that before the lord ſhould have benefit of the wardſhip, he ſhould be bound to two things: 1ſt, to warrant the land to the heir; 2dly, to acquit him from ſervice, and other duties to be done and paid to all other lords; both which the lord was bound to do, if he had accepted homage of his tenant. It was moreover declared, in confirmation likewiſe of the common law, that when ſuch a ward came of age, that is, to twenty-one years, he ſhould have his inheritance without relief, and without fine. Notwithſtanding ſuch heir within age was made a knight, and ſo might be judged fit to do the ſervice of a knight himſelf, it was provided, that though this might diſcharge his perſon from ward, yet his land ſhould remain in the cuſtody of his lord till he came of age [q].

THE obligation to reſtore the inheritance to the heir, without deſtruction or waſte, was aſcertained more preciſely, though in the ſpirit of the old common law [r]. It was enjoined [s], that the keeper of the land (that is, the guardian of ſuch an heir within age) ſhould only take reaſonable iſſues, and reaſonable cuſtoms and ſervices, without making deſtruction and waſte of his men, his villains, or his goods. Where a committee of the cuſtody of the king's ward, whether he was the ſheriff, as was then uſual, or any other perſon, was guilty of waſte or deſtruction, he was to make recompence; and the land was to be committed to two diſcreet men of that fee, who were to account for the iſſues. Likewiſe, where the king gave or ſold the cuſtody, and waſte was done, the cuſtody was to be forfeited, and to be committed to two perſons of that fee, as before mentioned. It was alſo directed, that thoſe who had the cuſtody of the land of ſuch an heir [t], ſhould, out of the iſſues and profits thereof, keep up the houſes, parks, warrens, ponds, mills, and other things appertaining to the land,

[q] Mag. Chart. ch. 3.
[r] Vid. ant. 114, 115.
[s] Ch. 4.
[t] Ch. 5.

and

and ſhould deliver to the heir, when he came of full age, all his land, ſtored with ploughs and other implements, at leaſt in as good condition as he received it in. It was provided, that all the above-mentioned regulations ſhould be obſerved in the cuſtody of archbiſhoprics, biſhoprics, abbies, priories, churches, and dignities vacant that belonged to the king; with this exception, that the cuſtody of *them* was never to be ſold. As to abbies not of the king's foundation, it was declared [t], that the patrons of them, if they had the king's charters of advowſon, or had an ancient tenure or poſſeſſion, were to have the cuſtody of them during their vacancy.

In addition to theſe proviſions it was moreover declared, as it had been before held at the common law, that heirs ſhould be married without diſparagement [u].

Several abuſes of purveyance as well as of tenures were removed or corrected. No conſtable of a caſtle or bailiff [x] was to take corn or cattle of any one who was not an inhabitant of the town where the caſtle was, but was to pay for the ſame; and even if the owner was of the ſame town, it was to be paid for in forty days. No conſtable of a caſtle was to diſtrain a knight to give money for keeping caſtle-guard, if he would do it in perſon, or cauſe it to be performed by ſome other who was able, and he could ſhew a reaſonable excuſe for his own omiſſion; if a perſon liable to caſtle-guard was in the king's ſervice, he was, for the time, to be free from caſtle-guard [y]. No ſheriff or bailiff of the king was to take any horſes or carts for the king's uſe but at the old limited price; i. e. ſays the ſtatute, for a carriage and two horſes, 10d. per day; for three horſes, 14d. per day: the demeſne cart, however, or ſuch as was for the proper and neceſſary uſe of any eccleſiaſtical perſon, or knight, or any lord, about his demeſne lands, was to

[t] Mag. Char. ch. 33.
[u] Ch. 6. Vid. ant. 116.
[x] Ch. 19.
[y] Ch 20.

remain

remain exempt, as had been by the ancient law. Again, neither the king nor his bailiffs or officers were to take the wood of any perſon for the king's caſtles, or other neceſſaries to be done, but by the licence of the owner [z]. Theſe limitations upon ſervices of tenure and upon purveyance were great benefits to the ſubject, and ſo far protected him againſt theſe arbitrary claims.

CERTAIN declarations were made as to the nature of tenure, in ſome inſtances. The king's prerogative in caſes of ward was declared in the following manner. If any held of the king in fee-farm [a], or by ſoccage, or in burgage, and held lands of another by knight's ſervice, the king was not, by reaſon of ſuch fee-farm, ſoccage, or burgage-tenure, to have the cuſtody of the heir, nor of the land holden of the fee of another; nor was he to have the cuſtody of ſuch fee-farm, ſoccage, or burgage, except knight's ſervice was due out of the ſaid fee-farm; nor was the king, by occaſion of any petit ſerjeanty, by a ſervice to pay a knife, an arrow, or the like, to have the cuſtody of the heir, or of any land he held of any other perſon by knight-ſervice [b]; all which ſeem to be only more explicit declarations of what the common law was thought to be before [c].

IT was deemed proper to guard againſt ſuch concluſions as might be founded on the above, or on any other prerogative, in caſe of baronies eſcheating to the crown; it was therefore declared, that if any man held of an eſcheat, as for inſtance, of the *honour* (for ſo it was in ſuch caſe called) of *Wallingford*, *Nottingham*, or any other eſcheat, being in the king's hands and being a barony, and died, his heir ſhould give no other relief to the king than he did to the baron, when it was in his hands; nor ſhould he do

[z] Mag. Chart. ch. 21.

[a] That is, an inheritance with a rent reſerved in *fee*, equal to, or at leaſt *a fourth* of that for which the ſame land had been lett to *farm*.

[b] Ch. 27.

[c] Vid. ant. 115.

any

any other ſervice to the king than he ſhould have done to the baron. The king was to hold the honour or barony as the baron held it, that is, of ſuch eſtate, and in ſuch manner and form, as the baron held it; and he was not, by occaſion of ſuch barony or eſcheat, to have any eſcheat but of lands holden of ſuch barony; nor any wardſhip of any other lands than what were holden by knight's ſervice of ſuch barony, unleſs he who held of the barony held alſo of the king by knight's ſervice *in capite* [d]; from which it appears, that he who held of the king muſt hold of *the perſon of the king*, and not of any honour, barony, manor, or ſeignory [e].

THESE proviſions about tenures were followed by one which was deſigned for the preſervation of tenures in their priſtine vigour and importance. We have ſeen [f] what alteration had gradually taken place in the original ſtrictneſs with which alienation of land had been reſtrained; ſo that as the law now ſtood where the tenure was of a common perſon, the tenant might in many caſes make a feoffment of part thereof, either to hold of himſelf, or of the chief lord. A feoffment of the latter kind ſeemed no way prejudicial to the lord, who ſtill ſaw the land in poſſeſſion of a perſon who was his homager: but when the tenure was reſerved to the feoffor, the homage, as far as regarded that portion of the land, paſſed from the lord to the feoffor. Theſe ſubinfeudations, as they, in a degree, ſtript the meſne lord of his ability to perform his ſervices, were found very prejudicial to the objects of the feudal inſtitution; and therefore the following regulation was made [g], namely, that, for the future, no freeman ſhould give or ſell any more of his land, than ſo as what remained might be ſufficient to anſwer the ſervices he owed to the lord of the fee.

IN what manner this prohibition affected tenants *in capite*, has been ſomewhat doubted. Some have held, that the law never allowed tenants *in capite* to alien with-

[d] Mag. Chart. ch. 31.
[e] 2 Inſt. 64.
[f] Vid. ant. 43 104, 175.
[g] Ch. 32.

out

out a licence from the king, and paying a fine: ſome, that after this act, land ſo aliened without licence was forfeited to the king. Others again held, that the land, in ſuch caſe, was not forfeited, but was ſeiſed in the name of a diſtreſs, and a fine was thereupon paid for the treſpaſs; of which latter opinion is lord Coke. This queſtion remained undetermined for the ſpace of one hundred years, when it was ſettled by ſtat. 1 Ed. III. c. 12. which declares that the king ſhould not hold ſuch land as forfeit, but that a reaſonable fine ſhould be paid in the chancery.

BUT in the caſe of common perſons who aliened in violation of this prohibition, the law was different; for it is the common opinion, that the act was interpreted in this manner; when a tenant aliened part of his land contrary to this act, the feoffor himſelf, during his life, could not avoid it; but his heir, after his deceaſe, might avoid it by force of this act; but if the heir had joined with his anceſtor in the feoffment, or had confirmed it, neither he nor his heirs could ever avoid it; and if the heir had entered under the ſanction of this act, the alienee of part might plead, that the ſervice whereby the land was holden, could be ſufficiently provided for out of the reſidue; upon which iſſue might be taken. There are many precedents where this proviſion had been ſo tried, before the ſtatute of *quia emptores*, 18 Ed. 1. which repealed this prohibition, and gave every one free liberty to alien his land in part, or in the whole[h], with a reſervation of the ſervices to the chief lord.

Mortmain.

OTHER means by which the end of tenures was defeated, were alienations in mortmain; for in conſequence of theſe, the military ſervice decayed, and lords loſt their fruits of tenure. Lands given to religious houſes continued in an unchangeable perpetuity, without deſcent to an heir; and therefore never produced the caſualties of wardſhips,

[h] 2 Inſt. 66.

eſcheats,

eſcheats, relief, and the like. On this account many landholders would inſert a clauſe in the deed of feoffment, *quòd licitum ſit donatori rem datam dare, vel vendere cui voluerit, exceptis* VIRIS RELIGIOSIS [i]. It was now endeavoured to put a ſtop to theſe gifts by a general proviſion; which was conceived in a way beſt calculated to meet the devices then made uſe of to elude the force of reſtrictions, like that juſt mentioned. It was ordained that [k] it ſhould not, for the future, be lawful for any one to give his land to a religious houſe, and to take back again the ſame land to hold of that houſe; nor, on the other hand, ſhould it be lawful for a religious houſe to take lands of any one, and leaſe them out to the donor. Moreover, if any one was convicted of giving his land to a religious houſe, the gift was to be void, and the land was to accrue to the lord of the fee. This proviſion is abridged, and the effect of it declared by the ſtatute of mortmain in the next reign [l]. "Of late," ſays that act, "it was provided, that religious "men ſhould not enter into the fees of any, without "licence and will of the chief lord of whom ſuch fees be "holden immediately;" becauſe if they did, the lord would claim them as forfeit. It is plain from this chapter of *Magna Charta*, particularly from this expoſition of it, that gifts of land to religious houſes were thereby prohibited generally, that is, even in caſes where the religious houſe did not give the land back to hold of the houſe, but kept it to themſelves in their own hands [m].

AMONG other ſeverities attending the condition of tenures, that which related to the dower and marriage of widows was not the leaſt. It ſeems from the following paſſages, that ſome impediments were thrown in the way of their juſt rights, which are not noticed in any document we have hitherto met with. It was declared, that a

[i] Bract. fol. 13.
[k] Ch. 36.
[l] 7 Ed. I.
[m] 2 Inſt. 74, 75.

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widow[n], immediately after the death of her husband, should, without any difficulty, have her *maritagium*[o], and inheritance; and should give nothing for her dower, her marriage, or her inheritance, which her husband and she held the day of her husband's death; by which must be meant some estate in *frank-marriage*, or *conditional fee*. She was, moreover, to continue, if she pleased, in the chief house of her husband, unless it was a castle, for forty days (called her *quarantine*) after his death; within which time her dower, if not assigned before, was to be assigned to her: and when she departed from the castle, a competent house was forthwith to be provided for her, where she might have an honourable residence till the assignment; and in the mean time she was to have reasonable estovers of common. For her dower she was to have assigned to her a third part of all the lands of her husband which were his during the coverture, unless where it happens that she was endowed of less at the church-door. By this description the widow's dower was enlarged; for in the time of Glanville, it was to be a third of such land

[n] Ch. 7.

[o] Lord Coke interprets this passage thus: "Widows are without difficulty to have their marriage (that is, to marry where they will, without any licence or assent of their lords) and their inheritance," &c. a construction which has two strong reasons against it. For, first, *maritagium* is generally used by the writers of this period for an estate in *frank-marriage*, and coupled as it here is with *hæreditas*, it seems to require that sense. 2dly, This construction is directly contrary to the latter part of this very chapter of *Magna Charta*, where it is expressly declared that widows *shall not* marry without the assent of their lord. Indeed, lord Coke found it convenient to comment away the meaning of this passage also, which he has done in these words: "That is to be understood "where such licence of marriage in "case of a common person was due "by custom, prescription, or special "tenure; and this expositi[on] is ap- "proved by constant and continual "use and experience, *et optimus in- "terpres legum consuetudo.*" (2 Inst. 18.) The latter position I admit must fully, and beg leave, upon the authority of it, to oppose the testimony of Bracton and Britton to that of our author. It is laid down by both of those writers, as will be shewn in its proper place, that this was the general law of the land; tho' I do not mean to dispute, but that the law *in lord Coke's time* might be as he has delivered it in this place. This is one strong instance, among many others, that our best writers have fallen into the error of canvassing points of ancient law upon principles and ideas wholly *modern*.

only

only as the husband had at the time of the espousals [n]. It was ordained, that no widow should be distrained to marry, if she chose to live single; provided she would give security not to marry without the licence and assent of the king, if she held of the crown; nor without the assent of her lord, if she held of a common person: which last provision was in conformity with the spirit of the common law [o].

THESE points concerning tenures, and the incidents of landed property, were ascertained by the Great Charter. The remainder of this ancient piece of legislation is taken up in reforming the modes of redress, and regulating the administration of justice.

NOTHING more required mitigation than the rigour with which the king's debts were in those times exacted and levied. This made it necessary to declare [p], that neither the king nor his bailiffs should seize any land or rent for a debt, so long as the goods and chattels were sufficient, and the debtor was ready to satisfy the demand. Further, the pledges of such a debtor, says the statute, shall not be distrained, so long as the principal is of sufficient ability; they are only to be answerable in his default; and they may, if they please, have the lands and rents of the debtor to reimburse themselves whatever they have paid for him.

WHERE the king's debtor dies, the king is to be preferred in payment of debts by the executor. If, says the charter, any one that holds of the king a lay fee [q] should die, and the sheriff or bailiff shews the letters patent of the king's summons for a debt due to the king, the sheriff or bailiff may attach and inventory all the goods and chattels of the deceased that are found within the fee, to the value of the debt, by the *view* [r] of lawful men; so that nothing may be removed till the king is satisfied; and

[n] Vid. ant. 100.
[o] Vid. ant. 117.
[p] Ch. 8.
[q] Ch. 18.
[r] *Per visum legalium hominum.*

after that, the reſidue is to remain to the executors, to perform the will of the deceaſed: if nothing is due to the king, then all the chattels are to go to the uſe of the defunct (that is, to his executors or adminiſtrators), ſaving, ſays the ſtatute, to his wife and children their reaſonable parts; the latter part of which proviſion does not ſeem to remove any of the difficulties which were before noticed in the text of Glanville upon the ſubject of teſtaments[r].

A VERY plain rule of the common law was enforced by a declaration[s], that no man ſhould be diſtrained to do more ſervice for a knight's fee, or for any freehold, than was properly due. This proviſion would not have been neceſſary, unleſs the remedy by diſtreſs had been lately abuſed, to compel a compliance with unjuſt demands.

THE moſt intereſting part of this famous charter, as viewed by a modern reader, are the proviſions for a better and more regular adminiſtration of juſtice. The effects of theſe are ſeen even in the preſent ſhape of our judicial polity, to the formation of which they contributed very conſiderably.

*Communia placita non ſequantur curiam noſtram.*

THE firſt of theſe regulations ordains, that *communia placita non ſequantur curiam noſtram, ſed teneantur in aliquo certo loco*[t]; the ſenſe of which ordinance is, that ſuits between party and party ſhall no longer be entertained in the *curia regis* (whoſe ſtile, during this reign, was properly *placita quæ ſequuntur regem*), which always followed his perſon, and might be held in ſeveral different places in the ſpace of one year, to the great inconvenience of ſuitors, jurors, witneſſes, and others; but ſhall be debated in ſome certain ſtationary court, where perſons concerned may reſort at all times for proſecuting and defending their ſuits.

THE operation of this proviſion muſt have had an immediate influence upon the two great courts of the king; namely,

[r] Vid. ant. 111, 112. [s] Ch. 10. [t] Ch. 11. Vid. ant 57.

that

that held before himſelf, and that which, though a part of it, was called the exchequer; for as both theſe attended the king wherever he reſided, all ſuits there between parties were interdicted by the words of this law; and the former remained a tribunal for diſcuſſion of criminal matters only; the latter for the cogniſance of cauſes concerning the revenue; while common pleas, as they were to be held in ſome certain place, ſeemed, naturally enough, to devolve upon the *bench*, or *juſtitiarii de banco*, which had been lately eſtabliſhed at Weſtminſter, in aid of the two former courts, as we have before ſeen. From this period, the bench, or, as the return was, *coram juſtitiariis noſtris apud Weſtmonaſterium* (to diſtinguiſh it from the king's court, which ſat at the Tower, and removed with his perſon), grew into more conſideration; and in after-times, as it became the ſole and proper juriſdiction for *communia placita*, was thence denominated *the common-pleas*. In what manner the other two courts recovered a ſort of cogniſance in common ſuits between parties, by means of different fictions, will be ſeen hereafter.

Juſtices of aſſiſe.

IT was endeavoured to render the proceeding by aſſiſe ſtill more expeditious, by ordaining juſtices to go a circuit once every year to take aſſiſes, inſtead of waiting till the juſtices itinerant came; which latter were perhaps not very regular, or, at leaſt, not wiſhed by the great barons to be very regular in their circuit, as they exerciſed a juriſdiction of a magnitude and extent that controuled the franchiſes of lords who had inferior courts. The ſtatute [t] directs, that aſſiſes of *novel diſſeiſin* and of *mortauncestor* ſhall not be taken but in their ſhires; whereas we have ſeen, that writs of aſſiſe and mortauncestor were returnable in Glanville's time *coram me vel juſtitiis meis* [v], in the *curia regis*, or court before the king; but this was now altered, and they were for the future to be taken in the following manner. The king, or, in his abſence out of the realm, the chief juſticiar, was to ſend juſtices into every county once a-year; and theſe, together with the

[t] Ch. 12. [v] Vid. ant. 178. 190.

knights

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knights of the county, were to take the aſſiſes there *. Such matters as the juſtices could not determine on the ſpot, were to be finiſhed in ſome other part of the circuit; and ſuch as, on account of their difficulty, they could not determine at all, were to be adjourned before the juſtices of the bench, and there decided. This is ſaid to be the firſt appointment of *juſtices of aſſiſe*; in conſequence of which theſe writs were ever after made returnable *coram juſtitiariis noſtris ad aſſiſas, cùm in partes illas venerint, &c.* Aſſiſes *de ultimâ præſentatione* [x], which hitherto had been taken in the king's courts, that is, *coram me vel juſtitiis meis*, were, for the future, to be heard before the juſtices of the bench only, and there finally determined; a proviſion which may be thought to be founded in abundant caution, when it had been before declared, that common pleas, of which this was certainly one, ſhould not follow the king's court.

WHILE order was taken for aſcertaining and governing the king's courts, ſome attention was given to the juriſdiction of the ſheriff, where matters of leſs moment were agitated with ſome ſolemnity. The county court was to be held [y] only from month to month, that is, not more frequent than once a month; and in counties where the interval of its ſitting had been greater, that was ſtill to continue. The ſheriff or his bailiff was not to hold his tourn in the hundred more than twice a-year, namely, after Eaſter and Michaelmas, and that in the uſual and accuſtomed place; and the view of frank-pledge was to be held by the ſheriff at Michaelmas. This laſt proviſion was in order to keep up the old conſtitution ſo admirably contrived for preſerving the peace, and the due order

* By the charter of John, the knights *aſſociated* with the juſtices were to be four, choſen by the county; and the aſſiſes were to be taken on the day, and at the place of the county court. This delegation of four by the county reminds us of the antient practice, when judgments were given *per omnes comitatûs probos homines* §. The later practice ſeemed to have been conſidered as the repreſentative of ſuch antient tribunal; for in the *Capitula Baronum* they ſtipulated, that none elſe (except the jurors and parties) ſhould be ſummoned to the taking of ſuch aſſiſes ‖. This is probably the origin of the preſent *aſſociation* in the commiſſion of aſſiſe.

§ Vid. ant. 84.

‖ Vid. Black. Chart. vol. II. Cap. Bar. 8.

[x] Ch. 13.

[y] Ibid. 35.

of

of the decennaries. It was enjoined, that all men's liberties ſhould be maintained as in the reign of Henry II.; and that the ſheriff ſhould take no more for his frankpledge than was allowed in that reign. It is cautioned, in this ſame chapter, that the ſheriff ſhould ſeek no occaſion or pretence either for holding his court oftener than is there directed, or taking any unreaſonable fees. Theſe injunctions about the ſheriff's court were dictated probably by the jealouſy that lords of franchiſes entertained concerning their own courts, with which the ſheriff too much interfered.

Amercements.

THE practice of courts was conſidered, and the uſage of the common law in ſome inſtances was adjuſted and confirmed. It was endeavoured, by declaring the law more fully on that ſubject, to prevent all abuſe of the *miſericordia*, or amercement, that uſed to be inflicted on *ſectatores*, or ſuitors, who were guilty of default or miſconduct in cauſes. A freeman, ſays the ſtatute [z], ſhall not be amerced for a ſmall default but after the manner of the default; and for a greater in proportion thereto, ſaving to him, in the language of Glanville, his *contenement*, or *countenance:* with reſpect to a merchant, ſaving to him, in like manner, his merchandize; and to a villain, except he was the king's villain, his wainage: from which proviſions it appears to have been the intention that theſe amercements ſhould not be the complete ruin of a man. For the ſame reaſon alſo it was declared, that none of the ſaid amercements ſhould be aſſeſſed but by the oaths of honeſt and lawful men of the vicinage. Earls and barons, ſays the charter, are not to be amerced but by their peers (which was done either by the barons of the exchequer, or in the court *coram rege*, in both which the juſtices were peers of the realm [a]), and according to their default [b]; nor is a clerk to be amerced in proportion to his ſpiritual be-

[z] Ch. 14. [a] Bract. fol. 116. b. [b] *Delicti.*

neſice,

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nefice, but after his lay-tenement, and, in like manner, only according to his default [c]. All theſe proviſions [d] were only to affirm and give a ſanction to ancient uſages, ſome of which have been before mentioned: upon this clauſe, however, was afterwards framed the writ *de moderatâ miſericordiâ*, for giving remedy to a party who was exceſſively amerced.

THE form of trial was intended to be adjuſted by the following regulation, though the preciſe meaning of it has occaſioned ſome doubt: *Nullus ballivus de cætero ponat aliquem ad legem manifeſtam, nec ad juramentum ſimplici loquelâ ſuâ, ſine teſtibus fidelibus ad hoc inductis* [e]. Whether this means, that the defendant ſhould not diſcharge himſelf by his own oath alone, without the oaths of other perſons ſwearing to their belief of his aſſertion; or, that no defendant ſhould be put to wage his law, unleſs the plaintiff ſupported his *loquela*, or declaration, by credible wineſſes, or, as they were afterwards called, *ſectatores*; has been a queſtion with ſome writers. Several paſſages in Bracton ſeem to favour the latter opinion; and Fleta explicitly declares this to be the meaning of the proviſion [f]; if ſo, moſt probably the practice of bringing into court the *ſectatores* of the plaintiff, was eſtabliſhed by this clauſe. The defendant making his law by the oaths of others ſwearing with him, was an old uſage [g], in criminal caſes at leaſt, and as ſuch is mentioned by Glanville; but it is not ſpoken of at all by that writer as a mode of proof for a defendant in civil ſuits; though we ſhall have occaſion to mention it frequently in that light upon the authority of Bracton. From the manner in which the latter author ſpeaks of a defence *per legem*, it ſeems to have been long in uſe: and from this paſſage in *Magna Charta*, we muſt conclude that it had been adopted from criminal to civil actions ſhortly after the time of

[c] *Delicti.* [d] Vid. ant. 157. [e] Ch. 28. [f] Flet. 137. [g] Vid. ant. 195. 198.

Glanville.

Glanville. The *sectatores*, in this sense, constitute another novelty, of which there is no mention in Glanville. When it had become the practice to admit *sectatores*, for so they also were called, to make the defence, it appeared reasonable enough to require, as *Magna Charta* here does, that certain persons should, in like manner, be brought to make out the plaintiff's case. It may be conjectured from the name, that both these sets of persons were originally chosen from the *sectatores*, or suitors of court, who were there present, ready to transact such business of the court as might arise.

*Nullus liber homo, &c.*

Of all the provisions made by this charter for the security of the person and property of the subject, none has so much engaged the attention and claimed the reverence of posterity as chap. 29, which contains a very plain and explicit declaration as to the protection every man might expect from the laws of his country. "No freeman shall "be taken or imprisoned; or be disseised of his freehold, "or liberties, or free customs; or be outlawed, or exiled, "or any otherwise destroyed;" "nor will we pass upon "him" (says the statute, in the name of the king), that is, he shall not be condemned in the court, *coram rege*; "nor will we send to him," that is, he shall not be condemned before any other commissioner or judge[h]; *nisi per legale judicium parium suorum, vel per legem terræ*, that is, by a lawful *trial*: either that by jury, which it was intended to promote and patronize; or by the ancient modes long known to the law of the land; namely, those mentioned just before, *per legem manifestam, per juramentum, per duellum*, or whatever it might be: though, in a larger sense, *per legem terræ* may comprehend every lawful process and proceeding, in contradistinction to that of trial by jury. The statute goes on and says, *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam*; where-

[h] So lord Coke interprets the words, *nec super eum ibimus, nec super eum mittemus.* 2 Inst. 46.

by

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by the king in his own perſon declares, that he will neither ſell, deny, or delay to any man a due adminiſtration of the law [i].

*Præcipe in capite.*

AMONG the regulations for the adminiſtration of juſtice, muſt be mentioned that reſpecting the writ of *præcipe in capite; breve quod dicitur*, ſays the charter, *Præcipe in capite de cætero non fiat alicui de aliquo libero tenemento, unde Liber homo perdat curiam ſuam.* We have ſeen, that, in Glanville's time [k], the regular way was, that for land held of a private lord ſuits ſhould be commenced in the lord's court, and that only writs concerning land held *in capite* ſhould be returnable in the king's court. This courſe ſeems to have been ſometimes not adhered to, and a writ of *Præcipe* for lands held of a private lord uſed to be brought ſometimes in the *curia regis*, as if the land was held *in capite*. It was to prevent this prejudice to the lord's court, that the above proviſion was made; and ſince that, all writs of right of land held of any other than the king, have been invariably brought in the lord's court, though they might afterwards be removed by *pone*. That this proviſion was aimed only at writs of right, and not at other *præcipes*, is expreſsly declared by Bracton [l].

THESE were the regulations ordained for the ſettlement and improvement of our law relating to property, and the adminiſtration of civil juſtice. Some few proviſions were made regarding our criminal law, though not of the ſame magnitude with the former.

*Sheriff's criminal judicature.*

As the diſtribution of juſtice, particularly that which concerns the lives and perſons of individuals, ſhould be in the hands of perſons not only of diſcretion and judgment, but alſo well verſed in the law, it was thought proper to ordain [m], that no ſheriff, conſtable, coroner, or other bai-

[i] By *rectum*, according to lord Coke, is ſignified examination and enquiry, being a mean, a right line, by which men were to be directed; by *juſtitiam*, a compulſory method of executing the judgments of law, or the great end to be attained by thoſe means. 2 Inſt. 56.

[k] Vid. ant. 172.

[l] Bract. fol. 281.

[m] Ch. 17.

liff

liff of the king, ſhould hold pleas of the crown: it is held, that[n] by this proviſion, the authority of the ſheriff to hear and determine theft and other felonies was entirely taken away. But this alteration could not have been made by force of this ſtatute alone; it muſt be remembered, that, in the time of Glanville, theft was not among the *placita coronæ*, but was tried by the ſheriff[o]. In the time of Bracton, we find it was reckoned among the *placita coronæ;* and this change of its nature was neceſſary, before the preſent clauſe of *Magna Charta* could have the effect of removing it from the juriſdiction of the ſheriff, as a plea of the crown. Whether this new denomination took place before or after the paſſing of *Magna Charta*, or in what period between the times of Glanville and Bracton, it is not eaſy or neceſſary to determine. This proviſion has been conſtrued to apply only to hearing and determining; and therefore it was held, that the ſheriff's power to take indictments of felonies and miſdemeanors, as well as the coroner's to take appeals, ſtill remained unimpeached; and in truth both were exerciſed for many years after, till a particular ſtatute[p] was made to aboliſh the laſt remains of the criminal juriſdiction belonging to theſe ancient common-law judges.

It was declared, that a woman ſhould not bring any appeal of death, except of the death of her huſband, in the following words[q]: "No one ſhall be taken or impriſoned "on account of the appeal of a woman brought for the "death of a man, except for the death of her huſband;" which is one, among many other articles of this ſtatute, that is only a confirmation of the common law[r].

[n] 2 Inſt. 32.
[o] Vid. ant. 128.
[p] 1 Ed. IV. c. 2.
[q] Ch. 34.
[r] Lord Coke, in his Commentary on this chapter, has laid it down, that a woman before this ſtatute might have an appeal of the death of any of her anceſtors; but this opinion ſeems to have no foundation, and what has been laid before the reader in another place, ſhews the law to have been quite otherwiſe. Vid. ant. 199, 200. 2 Inſt. 68.

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The writ *de odio et atiâ.*

THE writ *de odio et atiâ* was rendered more attainable than it had hitherto been. It was ordained that this writ, in future, ſhould iſſue *gratis*, and ſhould never be denied [r]. This is the firſt mention of this writ by name, though it has been alluded to in a former part of this Hiſtory [s]. This writ was one of the great ſecurities of perſonal liberty in thoſe days. It was a rule, that a perſon committed to cuſtody on a charge of homicide, ſhould not be bailed by any other authority than that of the king's writ; but to relieve a perſon from the misfortune of lying in priſon till the coming of the juſtices in eyre, this writ uſed to be directed to the ſheriff commanding him to make *inquiſition*, by the oaths of lawful men, whether the party in priſon was charged through malice, *utrùm rettatus ſit odio et atiâ;* and if it was found that he was accuſed *odio et atiâ*, and that he was not guilty, or that he did the fact *ſe defendendo*, or *per infortunium*, yet the ſheriff, by this writ, had no authority to bail him; but the party was then to ſue a writ of *tradas in ballium*, directed to the ſheriff; whereby he was commanded, that, if the priſoner found twelve good and lawful men of the county who would be mainpernors for him, then he ſhould deliver him in bail to thoſe twelve. The writ, or inquiſition *de odio et atiâ* had a clauſe in it, *niſi indictatus vel appellatus fuerit coram juſtitiariis ultimo itinerantibus;* ſo that the inquiſition was not in ſuch caſe to be taken [t]. We ſee how important it was, that this writ ſhould be attainable with as little expence and trouble as poſſible, to avoid the oppreſſion of malicious proſecutors.

As to the forfeiture and eſcheat of lands for felony, it was declared, that the king would not hold them for more than a year and a day, and then they ſhould go to the lords of the fee [u]; which was nothing more than the language of the law before [x].

[r] Ch. 26.
[s] Vid. ant. 198.
[t] Bract. 122, b. 123, a. b.
[u] Ch. 22.
[x] Vid. ant. 120.

IT

It was declared, that escuage should be taken[y] as it was wont in the reign of Henry II. This is the last provision of this famous charter; and is followed by some general declarations and renunciations dictated by the solemnity of the occasion. The liberties and free customs belonging to all persons, spiritual or temporal, are saved; and the king declares, that "all the customs and liberties aforesaid, "which we have granted to be holden within this our "realm, as much as appertaineth to us and our heirs, we "shall observe; and all men of this our realm, as well "spiritual as temporal, as much as in them is, shall observe "the same against all persons in like wise." For this grant of their liberties, the barons, bishops, knights, freeholders, and other subjects, granted a subsidy; and then, says the king, "we have granted to them, for us and our "heirs, that neither we nor our heirs shall attempt to do "any thing whereby the liberties contained in this char-"ter may be infringed and broken. And if any thing "should be done by any one contrary thereto, it shall be "held of no force or effect."

To these solemn and repeated declarations respecting the sanctity of this charter of liberties, is added *hiis testibus*, containing a list of the greatest names in the kingdom: for as in these times no grant of franchises, privileges, lands, or inheritances passed from the king but by the advice of his council, expressed under *hiis testibus*, this was thereby rendered an act of the king, attended with every formality that could possibly render it binding. In this consideration of it, it is properly *charta*, or a charter; though in that form it received likewise the authority of parliament. To the end of the charter, as it stands in the statute-book, is subjoined the confirmation of it before mentioned to have been made in the 25th year of Edward I.

[y] Ch. 37.

The

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HENRY III. Charta de Foreſtâ.

THE *Charta de Foreſtâ* is likewiſe taken from the roll of 25 Edward I. and has a confirmation of that date prefixed to it, ſimilar to that prefixed to *Magna Charta*. This charter, though of infinite importance at the time it was made, contains in it nothing intereſting to a modern lawyer, any further than as it gives ſome ſpecimen of the nature of the inſtitution of Foreſt Law, and the burthens thereby brought on the ſubject. In this light, the Charter of the Foreſt is a curious remain of antient legiſlation. It contains ſixteen chapters.

THE firſt chapter of this charter directed that all foreſts which had been afforeſted by Henry II. ſhould be viewed by good and lawful men; and if it was proved that he had any woods, except the demeſne, turned into foreſt, to the prejudice of the owner's wood, it was to be forthwith diſafforeſted; but the royal woods that had been made foreſt by that king, were ſtill to remain, with a ſaving of the common of herbage, and other things which any one was before accuſtomed to have[z]. This was the proviſion in relation to the foreſts made by Henry II. As to thoſe made by the kings Richard and John, they, unleſs they were in the king's own demeſnes, were to be forthwith diſafforeſted[a]. The charter directed, that all archbiſhops, biſhops, abbots, priors, earls, barons, knights, and free tenants, having woods in foreſts, ſhould have them as they enjoyed them at the firſt coronation of Henry II. and ſhould be quit of all purpreſtures, waſtes, and aſſarts, made therein before the ſecond year of Henry III.[b] Thus far were limits fixed to the extent of foreſts; and after theſe proviſions a clauſe is added, by which all offences therein were pardoned.

IN point of regulation it was ordained, that regarders, or rangers, ſhould go through the foreſt to make their regard, or range, as was the uſage before the firſt coronation of

[z] Ch. 1. [a] Ch. 3. [b] Ch. 4.

Henry

Henry II.[c] The inquiſition, or view for the *lawing* or *expeditation* of dogs, was to be had when the range was made, that is, from three years to three years; and then it was to be done by the view and teſtimony of lawful men, and not otherwiſe. A perſon whoſe dog was found not *lawed*, was to pay three ſhillings. No ox was to be taken for *lawing*, as had been before cuſtomary; but the old law in this point of expeditation was to be obſerved, namely, that three claws of the fore-foot ſhould be cut off by the ſkin: and, after all, this expeditation was to be performed only in ſuch places where it had been cuſtomary before the firſt coronation of Henry II.[d] It was ordained that no foreſter, or bedel, ſhould make ſcotal, or gather gerbe, oats, or any corn[e] whatever, nor any lambs, or pigs; nor make any gathering at all, but upon the view and oath of twelve rangers, when they were making their range. Such a number of foreſters was to be aſſigned, as ſhould be thought neceſſary for keeping the foreſt[f]. It was permitted to every freeman to agiſt his own wood, and to take his pannage within the king's foreſt; and for that purpoſe he might freely drive his ſwine through the king's demeſne woods; and if they ſhould lye one night in the foreſt, it ſhould be no pretence for exacting, on that account, any thing from the owner[g]. Beſides the above uſe of their own woods, freemen were permitted to make in their woods, land, or water within the foreſt, mills, ſprings, pools, marlpits, dikes, or arable grounds, ſo as they did not incloſe ſuch arable ground, nor cauſe a nuiſance to any of their neighbours[h]: they might alſo have ayries of hawks, ſparrow-hawks, falcons, eagles, and herons; as likewiſe the honey found in their own woods[i]. Thus was a degree of relaxation given to the rigorous ordinances of William the Conqueror, who had

[c] Ch. 5.
[d] Ch. 6.
[e] *Bladum.*
[f] Ch. 7.
[g] Ch. 9.
[h] Ch. 11.
[i] Ch. 13.

appropriated

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appropriated the lands of others to the purpoſe of making them foreſt; the owners thereof were now admitted into a ſort of partial enjoyment of their own property.

It was permitted that any archbiſhop, biſhop, earl, or baron, coming to the king, at his command, and paſſing through the foreſt, might take and kill one or two of the king's deer, by view of the foreſter if he was preſent; if not, then he might do it upon the blowing of a horn, that it might not look like a theft. The ſame might be done when they returned[k]. No foreſter, except ſuch as was a foreſter in fee, paying a ferm for his bailiwick, was to take any chiminage, as it was called, or toll for paſſing through the foreſt; but a foreſter in fee, as aforeſaid, might take one penny every half-year for a cart, and a halfpenny for a horſe bearing a burthen; and that only of ſuch as came through by licence to buy buſhes, timber, bark, and coal, to ſell again. Thoſe who carried bruſh, bark, and coal upon their backs were to pay no chiminage, though it was for ſale, except they took it within the king's demeſnes[l].

The judicature of the foreſt.

Part of this charter conſiſted of matters relating to the judicature of the foreſt. It was ordained, that perſons dwelling out of the foreſt ſhould not be obliged to appear before the juſtices of the foreſt, upon the common or general ſummons; but only when they were impleaded there, or were pledges for others who were attached for the foreſt[m]. *Swainmotes* (which were the courts next below thoſe of the juſtices of the foreſt) were to be held only three-times in the year; that is, the firſt at fifteen days before *Michaelmas*, when the agiſtors came together to take agiſtment in the demeſne woods; the ſecond was to be about the feaſt of St. *Martin*, when the agiſtors were to receive pannage: and to theſe two ſwainmotes were to come the foreſters, verderors, and agiſtors, and no others. The third ſwainmote was to be held fifteen days before St. *John*

[k] Ch. 11. [l] Ch. 14. [m] Ch. 2.

*Baptiſt;*

*Baptiſt;* and this was *pro fœnatione beſtiarum;* to this were to come the verderors and foreſters, and no other; and the attendance of ſuch perſons might be compelled by diſtreſs. It was moreover directed, that every forty days throughout the year, the foreſters and verderors ſhould meet to ſee the attachments of the foreſt *tam de viridi quàm de venatione*, as well for vert as veniſon, by the preſentment of the ſame foreſters.

SWAINMOTES were to be kept in thoſe counties only where they had uſed to be held [n]. Further, no conſtable, caſtellan, or other, was to hold plea of the foreſt, whether of vert or veniſon (which was a prohibition ſimilar to, and founded on a like policy with one in *Magna Charta* about theft); but every foreſter in fee was to attach pleas of the foreſt, as well for vert as veniſon, and preſent them to the verderors of provinces; and after they had been inrolled and ſealed with the ſeal of the verderors, they were to be preſented to the chief foreſter, or, as he was afterwards called, the chief juſtice of the foreſt, when he came into thoſe parts to hold the pleas of the foreſt, and were to be determined before him [o]. The puniſhments for breach of the foreſt law were greatly mitigated. It was ordained, that no man ſhould thenceforth loſe either life or limb [p] *for hunting deer;* but if a man was convicted of taking veniſon, he was to make a grievous fine; and if he had nothing to pay, he was to be impriſoned a year and a day, and then diſcharged upon pledges; which if he could not find, he was to abjure the realm [q]. Such were the tender mercies of the foreſt laws! Beſides ſuch qualifications of this rigorous ſyſtem, it was ordained, that thoſe who, between the time of Henry II. and this king's coronation, had been outlawed for the foreſt only, ſhould be in the king's peace,

Puniſhments.

[n] Ch. 8.
[o] Ch. 16.
[p] *Pro venatione.*
[q] Ch. 10.

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without any hinderance or danger, so as they found good pledges that they would not again trespass within the forest[r].

These were the regulations made by the Charter of the Forest; which concludes with a saving clause in favour of the liberties and free customs claimed by any one, as well within the forest, as without, in warrens and other places, which they enjoyed before that time. To the whole is subjoined a like confirmation as that to *Magna Charta*, in the 25th year of Edward I.

Many copies of the Great Charter and Charter of the Forest were put under the great seal, and sent to the archbishops, bishops, and other dignified ecclesiastics, to be safely kept; one of which remained in Lambeth palace till a very late period[s]. It is said, however, that Henry, when he came of age, cancelled, in a solemn manner, both those charters at a great council held at Oxford; and that he did this by the advice of Hubert de Burgh, chief justiciary, who, of all the temporal lords, was the first witness to both the charters. Notwithstanding this, we find in the 38th year of this reign, A. D. 1254, a solemn assembly was held in the great hall at Westminster, in the presence of the king; when the archbishop of Canterbury and the other bishops, apparelled in their pontificals, with tapers burning, denounced a sentence of excommunication against the breakers of the liberties of the church and of the realm, and particularly those contained in the Great Charter and Charter of the Forest; and not only against those who broke them, but also against those who made statutes contrary thereto, or who should *observe* them when made, or presume to pass any judgment against them; all which persons were to be considered as *ipso facto* excommunicated: and if any ignorantly offended therein, and, being admonished, did not reform within

Charters confirmed.

[r] Ch. 15.

[s] It is mentioned by bishop Burnet to have been among the papers of archbishop Laud.

fifteen

fifteen days, and make ſatisfaction to the ordinary, he was to be involved in that ſentence[t]. We ſhall ſee, in the ſucceeding reigns, how often theſe two charters were ſolemnly recognized and confirmed both by the king and parliament.

*Statutum Hiberniæ.*

THE firſt public act which preſents itſelf in the ſtatute-book after the two charters, is the *ſtatutum Hiberniæ de cohæredibus*, 14 Hen. III. which, from a conſideration of the matter and manner of it, has been pronounced not to be a ſtatute[u]. In the form of it, it appears to be an inſtruction given by the king to his juſtices in Ireland, directing them how to proceed in a certain point where they entertained a doubt. It ſeems, the juſtices itinerant in that country had a doubt, when land deſcended to ſiſters, whether the younger ſiſters ought to hold of the eldeſt, and do homage to her for their ſeveral portions, *or* of the chief lord, and do homage to him; and certain knights had been ſent over to know what the practice was in England in ſuch a caſe. The following is ſtated as the uſage of England at that time, agreeing with what is laid down both by Glanville and Bracton[x]. If any one holding *in capite* died, leaving daughters co-heireſſes, the king had always received homage of all the daughters, and every one of them held *in capite* of the king; and accordingly, if they were within age, the king had ward and marriage of every one. And again, if the deceaſed was tenant to any other lord, and the ſiſters were within age, the lord was to have the ward and marriage of every one; but with this difference, that the *eldeſt only* was to do homage for herſelf and her ſiſters; and when the younger ſiſters came of age, they were to do their ſervice to the lord of the fee by the hands of their eldeſt ſiſter: the eldeſt, however, was not on that account to exact of the younger homage, ward, or any other mark of ſubjection; for they were all equal in conſideration of

[t] Vid. Pickering's Statutes.
[u] Old Abridg. Tit. Homage.
[x] Vid. ant. 89.

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law, and deemed as one heir only to the inheritance: and ſhould the eldeſt have homage of her ſiſters, and demand wardſhip, the inheritance would be in a manner divided; ſo that the eldeſt ſiſter would be *ſimul et ſemel* ſeignioreſs, and tenant of the inheritance, that is, heireſs of her own part, and ſeignioreſs to her ſiſters; which could not well conſiſt together; the law allowing no other diſtinction to the eldeſt ſiſter but the chief manſion. Beſides, if the eldeſt ſiſter ſhould receive homage of the younger, ſhe would be ſeignioreſs to them all, and ſhould have the ward of them and their heirs; which was always guarded againſt by the policy of the law, that never entruſted the perſon or eſtate of a minor to the cuſtody of a near relation; which is the very reaſon given by Bracton[y] why the younger ſiſters ſhould not be in ward to the eldeſt[z].

THE other ſtatutes made in this reign are the *proviſiones*, or *ſtatutum de Merton*, 20 Hen. III. and the ſtatute *de anno biſſextili*, 21 Hen. III. after which there appears none till the 51ſt year of this king.

Statute of Merton.

THE ſtatute of Merton contains eleven chapters, which are arranged with as little order as thoſe of *Magna Charta*. The ſeveral alterations or confirmations of the law thereby made were as follow. We have juſt ſeen what proviſion had been made on the ſubject of ward and marriage by *Magna Charta*: To ſecure lords in this valuable caſualty, it was now further ordained, that when heirs were forcibly led away, or detained by their parents or others, in order to marry them, every layman who ſhould ſo marry an heir, ſhould reſtore to the lord who was a loſer thereby the value of the marriage; that his body ſhould be taken and impriſoned till he had made ſuch amends; and further, till he had ſatisfied the king for the treſpaſs. This proviſion related to heirs within the age of fourteen: as to thoſe

[y] Bract. 88.

[z] The Introduction of the Engliſh law into Ireland, and the progreſs it made there, may very properly become an object of conſideration in another place.

of

of fourteen, or above, and under full age, if such an heir married of his own accord without his lord's licence, to defraud him of his marriage, and his lord offered him reasonable and convenient marriage without disparagement; it was ordained that the lord should hold the land beyond the term of his age of twenty-one years, till he had received the double value of the marriage, according to the estimation of lawful men, or according to the value of any marriage that might have been *bonâ fide* offered, and proved of a certain value in the king's court.

THUS far the interest of lords was secured. The following provision was to protect infants against an abuse of this authority in their lords. If any lord married his ward to a villain or burgess where she would be disparaged, the ward being within the age of fourteen, and so not able to consent, then, upon the complaint of the friends, the lord was to lose the wardship till the heir came of age; and the profit thereof was to be converted to the use of the heir, under the direction of her friends. But if the heir was fourteen years old and above, so as to be by law of capacity to consent to the marriage, then no penalty was to ensue [a]. Again, if an heir, of whatever age, would not consent to marry at the request of his lord, he was not to be compelled; but when he came of age, and before he received his land, he was to pay his lord as much as any would have given for the marriage; and that, whether he would marry or not: for as the marriage of an heir within age was a lawful profit to the lord, he was not to be wholly deprived of it, but was to be recompensed in one way or other [b].

SOME further provision was made respecting dower. It was provided by *Magna Charta*, that widows should give nothing for their dower: in order still further to secure to them a ready assignment of dower, it was now ordained, that persons convicted of deforcing widows of their dower,

[a] Ch. 6. [b] Ch. 7.

should

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ſhould pay in damages the value of the dower, from the death of the huſband up to the time of giving judgment for recovery thereof; and they were moreover to be *in miſericordiâ* to the king [c]. Becauſe it had been doubted, whether, as a widow received her dower in the condition it was when her huſband died, ſhe ſhould not leave it in like manner to the reverſioner in the condition it was at her death; to remove this doubt, it was ordained, in favour of widows, that they might bequeath the crop upon their lands held in dower, as well as that upon their other lands [d].

USURY, which we have before ſeen [e] was treated with little lenity by our old law, was now put under a particular reſtraint. It was provided, that uſury ſhould not run againſt any perſon within age, from the death of his anceſtor, whoſe heir he was, until he arrived at his full age: a proviſion which was dictated, no doubt, by the conſideration that the profits of the infant's lands went to his guardian during the wardſhip, and that he was thereby diſabled from paying the annual intereſt. This new regulation was to be without any prejudice to the principal and the intereſt which had accrued in the life-time of the anceſtor.

Of commons.

A PROVISION made about commons of paſture was of great importance to lords of manors. When a lord, having great extent of waſte ground within his manor, infeoffed any one of parcels of arable land, it was uſual for the feoffee to have common in ſuch waſtes, as incident to his feoffment: and this was upon very good reaſons: for as the feoffee could not plough and manure his ground without beaſts, and they could not be ſuſtained without paſture; the tenant uſed to have this allowance of common for his beaſts of the plough as appendant to his tenancy; and from thence aroſe common appendant. Right of common, therefore, was founded upon the general intereſt of agriculture, and the particular one of the lord, whoſe land was thereby cultivated and improved. We have ſeen [f], that a

[c] Ch. 1. [d] Ch. 2. [e] Ant. pa. 86. [f] Ch. 5. [g] Ant. p. 149.

remedy

remedy by aſſiſe had been deviſed to maintain tenants in poſſeſſion of this right: but, it ſeems, this remedy had been puſhed too far, and began to encroach upon the demeſne and original right of the lord; who, having ſuffered his tenants to range at large over his waſtes for which he had not yet found any uſe, could hardly appropriate any part thereof without the imputation of encroachment on his tenants, and being liable to an aſſiſe of diſſeiſin of common of paſture. To prevent ſuch uſurpations upon the lord, and adjuſt the reaſonable claims both of lord and tenant, the following regulation was made: that when ſuch feoffees brought an aſſiſe of novel diſſeiſin for the common of paſture, and it was therein recognized before the juſtices, that they had as much paſture as was ſufficient for their freeholds [f], and that they had free ingreſs and egreſs from their freehold to their paſture; then the perſon againſt whom the aſſiſe was brought ſhould go quit for all the lands, waſtes, woods, or paſture, which he had converted to his own uſe. But ſhould it be alledged that they had not ſufficient paſture, nor ſufficient ingreſs or egreſs, the truth thereof was to be enquired of by the aſſiſe; and if it was found as alledged, then they were to recover their ſeiſin by view of the jurors, and the diſſeiſor was to be amerced, as in other caſes [g].

THE adminiſtration of juſtice was aided by a law concerning repeated diſſeiſins, or, as they were afterwards called, *re-diſſeiſins*. It was ordained, that when any perſon recovered ſeiſin of his freehold, before the juſtices in eyre, by aſſiſe of novel diſſeiſin, or by confeſſion of the diſſeiſors, and ſeiſin had been delivered by the ſheriff; if the ſame diſſeiſors again diſſeiſed the ſame tenant of the ſame freehold, and were convicted thereof, they ſhould forthwith be committed to priſon, till they were diſcharged by the king upon payment of a fine. The way of bringing ſuch contemners of the law to puniſhment is thus directed by

[f] *Ad tenementa ſua.* [g] Chap. 4.

the

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the ſtatute: When complaint was made at the king's court, the parties injured were to have the king's writ directed to the ſheriff, in which a relation was to be made *de diſſeiſinâ factâ ſuper diſſeiſinam*, of a diſſeiſin upon a diſſeiſin; and the ſheriff was to be thereby commanded, that he, taking with him the keepers of the pleas of the crown [h], and other lawful knights, ſhould go to the place in queſtion, and there, in their preſence, by the firſt jurors and other neighbours and lawful men, make diligent inquiſition of the matter: and if the party was convicted, he was to be dealt with as before mentioned; if not, the plaintiff was to be amerced. The ſheriff was not to entertain ſuch a plaint without the king's ſpecial command, namely, by writ. What is here ſaid of lands recovered in aſſiſe of novel diſſeiſin, extended to thoſe recovered by aſſiſe of mortauncеſtor, or in any proceeding *per juratam* [i].

An alteration was made in the limitation of time for bringing certain writs. In a writ of right, as the law had been for ſome years, a deſcent might be conveyed *à tempore Henrici regis ſenioris*; but it was now ordained, that there ſhould be no mention of ſo diſtant a time, but only *à tempore Henrici regis avi noſtri*. Writs of *mortauncеſtor*, *de nativis*, and *de ingreſſu*, (a writ which had lately ſprung up, and of which more will be ſaid hereafter) were not to exceed *ultimum redditum domini regis Johannis patris noſtri in Angliam*, king John's laſt return from Ireland into England; nor writs of novel diſſeiſin, *primam transfretationem domini regis Henrici, qui nunc eſt, in Vaſconiam* [k].

[h] Vid. ant. where theſe are ſuppoſed to be the *coroners* of the county.

[i] Ch. 3.

[k] Ch. 8.

Henry I. began his reign A. D. 1100. Henry II. A. D. 1154. King John went to Ireland in the 12th year of his reign, and returned the ſame year; between that and the 20th Henry III. were about 25 years. Henry III. went into Gaſcony for the firſt time in the 5th year of his reign; ſo that there were about fifteen years between that and the ſtatute of Merton. [2 Inſt. 94, 95.] Writs of mortauncеſtor before this act were *poſt primam coronationem Henrici* II. which was 20th October, 1154. Thoſe of novel diſſeiſin were *poſt ultimam transfretationem Regis in Normanniam*, which was in 1184, the 30th year of his reign. Vid. ant. 189.

BEFORE

BEFORE another chapter of this ſtatute is mentioned, it may be convenient to recollect, that there were two kinds of ſuits; ſuit *real*, as it was afterwards called, and ſuit *ſervice*. Suit real was, in reſpect of reſidence, due to a leet, or tourn; ſuit ſervice was, by reaſon of tenure of land, due to the county, hundred, wapentake, or manor whereunto a court baron was incident. Every one who held by ſuit ſervice, was required to appear in perſon, becauſe the *ſuitors* were judges in thoſe courts; and if he did not, he would be amerced; which was a heavy grievance; for it might happen that he had lands within divers of thoſe ſeigniories, and the courts might all be kept in one day; therefore, as he could attend perſonally only at one place, it was provided by this act, that every freeman who owed ſuit to the county, trithing [m], hundred, wapentake [n], or to the court of his lord, might freely make his attorney to do ſuit for him [o]. This permiſſion did not enable him to do the ſame at the leet, or tourn, becauſe he could not be within two leets, or two tourns [p].

Of ſpecial baſtardy.

IT is recorded in the ſtatute of Merton, that the queſtion about the legitimacy of children born before wedlock was ſtill agitated between the clergy and common lawyers; the former maintaining their legitimacy, according to the conſtitution of pope Alexander; the latter alledging this to be contrary to the common law; as hath been mentioned before [q]. The biſhops now urged in council, that when the king's writ of baſtardy was directed to them, to enquire whether a perſon born before wedlock was entitled to the inheritance, they neither could nor would give any anſwer thereto, becauſe the queſtion was put in a ſpecial way, and not in the form required by the church, which was general, whether baſtard or not; and therefore, to make an end of the controverſy, and the diffi-

[m] A diſtrict containing three hundreds.
[n] Another name for a hundred.
[o] Ch. 10.
[p] 2 Inſt. 99.
[q] Vid. ant. 85.

culty

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culty at once, they prayed the nobles to consent, that all such as were born before matrimony should, consistently with the law of the church, be deemed legitimate, and be intitled to succeed to the inheritance, equally with those born within wedlock [r]. But the statute stays, *omnes comites et barones unâ voce responderunt, quòd nolunt leges Angliæ mutari, quæ hucusque usitatæ sunt, et approbatæ* [s]. This point of difference between the canon law and the law of the land did not rest here. In the same year, a solemn agreement was made between the king, bishops, and barons in council assembled, and by this the practice was settled, as will be shewn when we come to speak more particularly on the subject of bastardy. The nobles, who resisted the inclination of the ecclesiastics with such firmness, had no scruple to propose an innovation which had no object but to accommodate these potent landholders, at the expence of the liberty of the subject; but in this they were opposed by the king, who refused his consent: the proposal was, that they might imprison in a prison of their own all persons that were found trespassing in their parks and vivaries [t].

In the next year, there follows in the statute-book a public instrument which is intitled, the statute *de Anno Bissextili*, 21 Hen. III.; but which is, in truth, nothing more than a sort of a writ, or direction, to the justices of the bench, instructing them how the extraordinary day in the leap-year was to be reckoned, in cases where persons had a day to appear at the distance of a year, as on the essoin *de malo lecti*, and the like. It was thereby directed, that the additional day should, together with that which

[r] This piece of canonical jurisprudence is actually adopted in the law of Scotland. They consider the subsequent marriage as having been entered into when the child was begotten; and therefore it is confined to the case of such women, whom the father, at that period, *might* have married. Ersk. Prin. b. 1. tit. 7. § 37.

[s] Ch. 9.

[t] Ch. 11.

went

went before, be reckoned only as one, and so of course within the preceding year.

After this, there are no statutes (except the confirmation of the charters 38 Henry III. which has been mentioned already) till the fifty-first year of this king. During this interval of thirty years, great progress was made towards bringing the law to that state of consistency and learning to which it arrived in this reign; there is also the strongest proof [u] that the treatise of Bracton was written within this space of time; and that the account of the law given by that author, does not include the alterations made therein by the statutes passed in the 51st and 52d years of this king. It seems therefore the most natural order, to postpone the consideration of those statutes till we have taken a view of the previous state of the law; from whence we may proceed to the alterations made therein by those statutes.

This view of the law, as it stood towards the end of the present reign, will include in it not only a fuller account of what has been before delivered from the authority of Glanville, but likewise the numerous additions, variations, and improvements that had been made since his time. This will be extracted, as we promised, from that great ornament of our antient jurisprudence, the treatise of Bracton, from which such parts will be selected as are thought best suited to the design of this History of our judicial polity. As the plan we here propose will lead us to reconsider all or most of the topics which were examined in the reign of Henry II. it will be very difficult to avoid the appearance of repetition. This will be guarded against as much as possible; and we trust that the reader will be satisfied that no subject is brought before him a second time, but where the nature of the enquiry and the progress of the History made it absolutely necessary.

[u] Vide post.

We

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Ranks of perſons.

We ſhall begin our ſhort view of the law in this reign with ſome obſervations on the rights of perſons. The ranks of freemen are ſtated by Bracton to be theſe; dukes, earls, barons, *magnates*, or vavaſors, knights, and thoſe who were plain freemen. Vavaſors, he ſays, were perſons *magnæ dignitatis*, and were ſo called *tanquam* VAS *fortitum ad* VALETUDINEM [x]. The condition of *ſervi*, or *villani*, as they were commonly called, is more particularly deſcribed by this author than by Glanville, and the nature of that ſtate may be tolerably well collected from his account of it. The *ſervus*, though he was generally conſidered as *in poteſtate domini*, and not *ſui juris*; yet, as to life and limb, he was intitled to the protection of the law. The lord might take from his villain every thing he had, even his principal piece of property, which was uſually his *waynagium*, or implements of huſbandry; the rule being, that *quicquid per ſervum acquiritur, id domino acquiritur* [y]. Theſe *ſervi* did not eſcape from their condition by going off the land of the lord, if they continued in the habit of returning; and ſometimes they uſed to be permitted to abſent themſelves for a length of time from the lord's lands, and employ themſelves in trade, upon paying to the lord a fine called *chevagium*, or chiefage, as an acknowledgment of their ſubjection and villenage. But if they left the lord's land without returning regularly, or ceaſed to pay their *chevagium*, they were then conſidered as fugitives; and when they were once become fugitive, they were to be purſued and demanded by the lord, both within liberties and without; for which purpoſe the aid of the king's officers might be had [z]: and after ſuch claim had been made, the *ſervus*, though he was not taken till after a year had elapſed, might be detained; but if no ſuch claim had been made, then, at the end of a year, the *ſervus* would be privileged, and conſidered as free. So ſtrictly was claim

[x] Bract. 5. b. [y] Ibid. 6. [z] Ibid. 6. b.

required

required to be made, that if the lord, after the lapſe of three or four days only, without making any claim, had taken him any where *extra villenagium* [a], beyond the limits of his villenage, he would have been liable to an action for the impriſonment.

It ſeems, that villains in the king's demeſnes were of different kinds. There were thoſe who had been ſuch before the Conqueſt, and who, in conſequence of the polity then eſtabliſhed, were permitted to hold their land in villenage [b], by villain and uncertain ſervices, and who were to do every thing which their lords commanded them. But in the diſorder of that revolution, many freemen were diſpoſſeſſed of their lands by the lords to whom they were allotted, and were afterwards permitted to hold them in villenage, with the burthen of doing ſome villain offices, which however were certain and ſpecified. Theſe perſons were, according to Bracton, ſometimes called *glebæ adſcriptitii*, becauſe, ſo long as they did the appointed ſervices, they had the privilege *not to be removed* from the land; and were indeed freemen: for though they did villain ſervices, yet it was not in their own perſonal right, but on account of their tenement, which was held in villenage, though, ſays Bracton, a ſort of privileged villenage [c]. "There was," ſays the ſame authority, "another "holding in the king's demeſne manors, which was by "the ſame villain cuſtoms and ſervices as the former, "and yet was not villenage; nor were the tenants *ſervi*; "nor did they derive their title from the Conqueſt, as "the former did, but by covenant with their lords; ſo "that ſome of them had charters, and ſome not; and "theſe, if ejected, might recover ſeiſin by aſſiſe, which "none of the former could. Beſides theſe, there were "alſo tenures by ſoccage, and knight's ſervice, in the

[a] *Extra villenagium*, that is, "out "of his ſtate of villenage," *or* beyond the lord's villain-territory.

[b] Vide ante, p. 29.

[c] Brac. 7.

"king's

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"king's demeſnes." Theſe latter, ſays Bracton, were *ex novo feoffamento* and *poſt Conqueſtum*; by which he ſeems to intimate his opinion as to the origin of the two principal tenures, thoſe in ſoccage, and by knight-ſervice [d].

A VILLAIN might alſo become free by manumiſſion; which was a ſolemn and expreſs act of declaring him free. There were other acts of the lord which were conſtrued to amount to a declaration of a villain's liberty, becauſe they put him into a condition incompatible with a ſtate of ſervitude. Thus, if a lord was to receive homage of his villain, or ſhould, without any expreſs manumiſſion, give land to his villain, *habendum et tenendum liberè* to him and his heirs, though no homage was done, ſuch gift was conſidered as an intimation that the donee ſhould become a freeman. Nevertheleſs, if a gift was made to hold *per liberum ſervitium*, it was otherwiſe; there being, according to Bracton, a difference between holding *liberè* and *per liberum ſervitium*; for as a tenure in villenage would not make a freeman a villain, ſo a holding by free ſervice would not make a villain free, unleſs it was preceded by homage [e].

Of villenage.

BRACTON ſpeaks of two orders of villains: namely, thoſe who held in *pure villenage*, and thoſe who held in *villain ſoccage*. In the former, the ſervice was uncertain and indeterminate; ſo that the villain, according to his expreſſion, did not know in the evening what was to be done in the morning, but was to do every thing that was commanded him: in the latter, the ſervice was certain; and yet the holding was not *liberum tenementum*, or freehold. Neither of theſe could alien their lands, as freeholders could; and if they did, it might be recovered at law [f]: but the way in which a villain ſockman was to make a tranſfer of his eſtate, was this: he was firſt to make a ſurrender of it to the lord, or, if he was not preſent him-

[d] Bract. 7. b. [e] Ibid. 24. b. [f] Ibid. 26.

ſelf,

ſelf, to his ſteward[g], and from his hands the conveyance was to be made to the purchaſer; and this was conſidered as the gift of the lord, in whom, and not in the villain ſockman, the freehold reſided[h]. Bracton does not ſay whether thoſe who held in pure villenage had even the power of transferring their lands in this limited way; and it ſhould ſeem, they had not yet obtained ſuch privilege.

Of free ſervices.

We are enabled to ſpeak more particularly of tenures than we did in the reign of Henry II.; they had now become more defined, were better underſtood, and treated with much more refinement. Tenure depended on the ſervices reſerved at the time of the feoffment; and therefore, to underſtand the nature and variety of tenures, it will be neceſſary to conſider more particularly the clauſe of *reddendum*, by which the ſervices were reſerved in deeds of feoffment. When a donation was made by a private perſon, it was uſual to expreſs in the deed, with ſome preciſion, whatſoever was to be rendered to the donor in compenſation for the thing given. Thus a gift was made ſometimes *pro homagio et ſervitio*, for homage and ſervice; ſometimes for ſervice only, without homage. If it was intended to create a knight's fee, the proper reſervation would be *pro homagio et ſervitio*; but in the creation of a ſoccage-tenure, it would not be ſo proper; as fealty only, and not homage, was due for ſoccage-land: and indeed ſhould homage have really been done, yet this would not entitle the chief lord to wardſhip and marriage; for ward and marriage did not ſo properly follow the homage, as the ſervice, which in fact, and which alone, made a tenure, either military or ſoccage. Thus it often happened that homage was not required even in military tenures; as where one made a gift to his eldeſt ſon and heir, or a brother to a younger brother, ſuch gifts were uſually made without reſerving homage, leſt the donor ſhould be ex-

[g] *Servienti.* [h] Bract. 26.

cluded

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cluded from succeeding to the inheritance by the rule, *nemo potest esse dominus et hæres.* For the same reason, gifts, when made to a younger son, used to be, *pro servitio tantùm, tenendam de me totâ vitâ meâ sibi et hæredibus suis, et post mortem meam de capitalibus dominis pro servitio quod ad illam terram pertinet.* When the service was reserved in this way, the elder son might be heir to the younger, because there was no homage to constitute a *dominium:* if the gift had been *tenendam de capitalibus dominis*, it would have excluded him from the wardship also. In like manner, if a gift was made by the father to the eldest son, whether it was *pro servitio* or *pro homagio*, if it was to hold of the chief lord of the fee, and he died in the life of the father, the younger brother would succeed, and the father be excluded from the wardship; if he was a minor, the ward and marriage would belong to the chief lord, and if of full age, the relief likewise[i].

THE reservation was sometimes *reddendo* so much *per annum* at certain times, or *faciendo* such and such services and customs, *pro omni servitio, consuetudine seculari, exactione, et demandâ;* by which all secular demands that belonged to the lord in right of the tenement were remitted. It must be observed of services and customs, that some belonged to the lord of the fee, and some to the king, corresponding with the distinction beforementioned between suit *service* and suit *real*[k]. Of the latter kind, says Bracton, were *sectæ ad justitiam faciendam*, as in writs of right; *ad pacem*, to sit in judgment on a thief; and *pro aforciamento curiæ.* To the donor of the land belonged such services as were due in recompence of the thing given, as rents, whether in gold or silver, in monies numbered; as if it ran *reddendo inde per annum decem aureos, argenteos;* or whether it consisted in fruits and profits of the ground, *reddendo inde per annum decem coros tritici*, four quarters of barley, four

[i] Bract. 34. b. [k] Vid. ant. 265.

barrels

barrels of oil, or the like. Sometimes the reservation was made optionally; as *reddendo inde per annum* so many gilt spurs, *or* sixpence, *or* a pound of pepper, *or* cumin, *or* wax, *or* a certain number of gloves; in which cases it[1] was at the option of the tenant which of them he would pay. Some services were to be performed to the lord of the fee, and consisted in doing some act at certain seasons: unless such services were specified, they would not be demandable; as where it was said, *et faciendo inde sectam ad curiam domini sui, et hæredum suorum, de quindenâ in quindenam, &c.* or, *faciendo inde* so many ploughings or reapings, and the like; all which belonged to the lord of the fee, and were due out of and in right of his farms and tenements, and therefore were not personal, but feudal or predial services.

Of serjeanty.

A PERSON might infeoff another to hold *by serjeanty*, which was of different kinds: some such services belonged to the lord who infeoffed; some to the king. Thus, for instance, when a person was to hold by the service of riding with his lord[m], or of holding the lord's pleas, or serving his writs within a certain district, or feeding his dogs or hounds, keeping his birds, finding him in bows and arrows, or carrying them, and innumerable like services; all these were called serjeanties. Services being divided into such as were called *forinsic* and such as were denominated *intrinsic*, all the abovementioned they considered in a particular manner as *intrinsic*, because they were of necessity to be expressed in the charter; and they were likewise reserved to the lord of the fee, and had not any reference to the king's army or the defence of the realm: in such tenure no ward or marriage accrued to the lord, any more than in soccage. These were usually called *petit serjeanty*, to distinguish them from such as related to the king only. A serjeanty of

[1] Bract. 35.

[m] Which tenants, says Bracton, were usually called *Red Knights*.

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this latter kind was[n], when a person was infeoffed by the service of finding one or more men to go with the king upon any military expedition with some kind of accoutrement; and from such a serjeanty, whether held of the king or a private person, there were due to the chief lord the ward and marriage of the heir[o].

It was before said, that the above services which were specified in the deed were called *intrinsic*. This term and its opposite were not wholly confined to express, that services were, or were not in the charter; for some other services, though expressly named in the charter of feoffment, were termed *forinsic*, because they belonged to the king, and not to the chief lord. These were performed without the tenant appearing in person, for he might satisfy the king, some way or other, for the service: they were due as accident or necessity made them requisite, and were called by various names. They were not only termed generally *forinsic*, as they belonged to the king, but had various other names of a more specific import. They were sometimes called *scutagium*, sometimes *servitium domini regis*; the meaning of which was this; they were called *forinsic*, because the service was done *foris* abroad, that is, *extra servitium* due to the chief lord; *scutagium*, because it related *ad scutum*, and the military service; *servitium regis*, because it belonged to the king, and not to the lord; and a feoffment by either of these latter appellations was con-

[n] It might be expected that Bracton should call this latter *magna serjeantia*, to distinguish it from the other kind; but he does not. In another part of his book we are told by this author, that serjeanty was divided into *magna* and *parva*, with respect to its *value*, and as it should seem not with any distinction between a service performed to the king, and to a common person. This value appears not to have been very accurately defined. He says, that according to some, it was a great serjeanty if valued at 100 shillings; and those, says he, might be called *petit serjeanty* that were worth half a mark. (87. b.) Whatever difference of opinion there was about the names, there seems to have been none about the consequence of the respective services, namely, in what cases ward and marriage was demandable by the lord, and in what not.

[o] Bract. 25. b.

sidered

ſidered as the ſame thing: yet if a charter gave land *faciendo inde forinſecum ſervitium, &c.* the ſervice, or the ſubſtitute for ſervice, was to be expreſſed; as by the ſervice of one knight's fee, or more; by the ſcutage of a hundred ſhillings; and the like [p].

THERE were other cuſtoms and dues which were neither intrinſic nor forinſic, but were rather, ſays Bracton, *concomitants* of ſervices regal or military, and of homage. Theſe were relief, marriage, and wardſhip, which need not be expreſſed in the charter; becauſe if homage and regal ſervice preceded, it followed that theſe belonged to the chief lord, whether it was a knight's ſervice, or a ſerjeanty relating to the army. There were other cuſtoms and dues which, Bracton ſays, were not called ſervices, nor the concomitants of ſervices; as reaſonable aid to make the eldeſt ſon a knight, or marrying his eldeſt daughter; which aids were *de gratiâ*, and not *de jure* [q], and were in conſideration of the lord's neceſſities; for they were only to be demanded of his freemen in caſes of neceſſity. Theſe aids, too, were conſidered as perſonal, and not predial; for they reſpected the perſon, and not the fee, as may be collected from the terms of the king's writ which uſed to iſſue to the ſheriff, commanding him, *quòd juſte et ſine dilatione habere faciat tali rationabile auxilium de militibus liberè tenentibus ſuis in ballivâ ſuâ, &c.* As theſe aids were not to be levied at the pleaſure of the lord, reſpect was to be had, in aſſeſſing them, to the circumſtances both of the tenant and lord, ſo as the lord might be relieved without oppreſſing the tenant; or, as Bracton ſays, *quòd auxilium accipienti cederet ad commodum, et danti ad honorem* [r].

A MAN might be infeoffed by divers kinds of ſervices; as, by the ſervice of one penny, and rendering ſcutage (that is, when demanded for particular occaſions, as before-men-

[p] Bract. 36. b. [q] Vid. ant. 127. [r] Bract. 36. b.

tioned), and by one or more of the ſerjeanties above noticed. If the render was to be only in money, without any ſcutage, or ſerjeanty; or if two ſervices were required optionally, as to give ſome certain thing *pro omni ſervitio*, or a certain ſum of money; ſuch a holding was called *ſoccage*: but though it was only for the payment of one farthing, if ſcutage and regal ſervice were added thereto, or if any ſerjeanty was reſerved, it was conſidered as knight-ſervice[s]. The creation of all theſe tenures depended on the pleaſure of the feoffor; for whatever might be the ſervice he was bound to perform towards *his* feoffor, he might exact either more or leſs, upon making a feoffment to another. Thus a tenant by knight's ſervice might infeoff another in ſoccage, or make a grant in villenage. Again, he might require knight's ſervice, though he held only in ſoccage[t]: and in ſuch caſe, as well as in others, the tenant was protected againſt the chief lord by the warranty of the meſne, who ſtood between them.

THE different kinds of tenure appear, from the above enquiry, to be theſe: ſome were by military ſervice, ſince called knight's ſervice, others by ſerjeanty; for which homage was to be done to the chief lord, becauſe of the forinſic and regal ſervice, and of that which related *ad ſcutum*, and the military calls for the defence of the country. Another was a holding *in ſoccagio libero*, in *free ſoccage*, where the ſervice to the chief lord conſiſted in money, and nothing was due *ad ſcutum et ſervitium regis*: this was called ſoccage from *ſoccus*, a plough; becauſe the tenants thereof were deputed, as it ſhould ſeem, merely to be cultivators of the ground. In this tenure the ward and marriage belonged to the neareſt relations; and though homage ſhould *de facto* be done for ſuch land, as it ſometimes was, the chief lord was not on that account intitled to the ward and marriage, as thoſe caſualties did not always,

[s] Bract. 37. b. [t] Ibid. 36.

though

though they usually did, follow homage. There was another kind of soccage, called *villain soccage*, where homage was never done, but only the oath of fealty was taken; the lord being interested to see that his villain did not, by any surprize, become his homager [u].

Homage and fealty.

We are next to consider the circumstances of tenure, the principal of which were *homage*, *fealty*, and *relief*. Much stress was laid on homage, to which was ascribed greater efficacy than to any other part of this system, as it was the tie of feudal connection between lord and tenant. Homage is therefore defined by Bracton, to be that legal bond by which a lord is held and bound to warrant, defend, and quiet his tenant in his seisin against all mankind, for a service performed by him, as expressed in the deed of gift; and, on the other hand, that obligation by which a tenant was equally bound to preserve his faith towards his lord, and to do his proper service; which connection, as has been before shewn, is thus expressed by Glanville; *tantùm debet dominus tenenti, quantùm tenens domino, præter solam reverentiam* [w].

Homage was to be done at the time of the gift being made, either before or after seisin: if seisin was not delivered, the homage, says Bracton, had no effect [x]. Homage was to be done several times by the same tenant to the same lord, if for different freeholds. It was due for all lands, tenements, and rents; and for every thing else which was held by any of the tenures before-mentioned [y]. Homage was not due for a tenement that was held only for a term, (which included an estate for term of life) but *fealty* only. The person who was to do homage, says Bracton, was to seek his lord wherever he could be found; he was to approach him with reverence, and put both his hands between those of his lord: by which was meant to be signified on the part of the lord, protection, defence,

[u] 2 Bract. 77. b. [w] Ibid. 78. b. [x] Ibid. 79. [y] Ibid. 79. b.

and

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and warranty; on the part of the tenant, reverence and subjection; and he was to pronounce in that posture these words: *Devenio homo vester de tenemento quod de vobis teneo, et tenere debeo, et fidem vobis portabo de vitâ et membris et terreno honore, contra omnes gentes, salva fide debitâ domino regi, et hæredibus suis;* which agrees in substance with the form in Glanville's time *. After this he was to take his oath of fealty, the form of which is not mentioned by Glanville, and is as follows: *Hoc audis, domine N. quòd* FIDEM *vobis portabo de vitâ & membris, corpore et catallis, et terreno honore: sic me Deus adjuvet, et hæc sancta Dei evangelia.* The difference between homage and fealty was this; that in the oath of fealty, which was the lesser obligation, the tenant engaged to bear his *faith* to his lord; in the other, he in addition thereto said, *Devenio vester* HOMO, that is, he became his *homager*.

HOMAGE was not to be done in private, but in some public place, where every body had access; as in the county or hundred court, or in the court of the lord, in the presence of many persons, that the lord might have witnesses of the tenant being bound to him. Again, it was requisite that a diligent examination should be made at the time, whether the person doing homage was intitled to the land; as whether he was right heir to the person last seised; what was the kind and size of the freehold; whether he held it in demesne, or in service; or what part thereof in one or the other [z]; all which was to prevent either the lord or the tenant being deceived. The effect of homage was such, that this caution seemed highly necessary; for when a person had done homage to one who turned out not to be his true lord, yet he could not recede from the obligation of homage, without the judgment of some court, so long as he held the land for which he did it.

* Vid. ant. 123.

[z] Bract. 80.

THERE

THERE were many ways in which the homage was diſſolved: as, if either lord or tenant did any thing to the diſheriſon of the other; in the former caſe, the lord was to loſe his *dominium*; in the latter, the tenant was to loſe his tenement. Again, ſhould the lord die without heirs, the homage on his part was gone, but it revived in the perſon of the next ſuperior lord, and ſtill continued in the perſon of the tenant: the ſame, if the lord committed felony. In theſe caſes, the ſuperior lord could not waive the homage which was to commence between him and the inferior tenant; for the tenant would then be deprived of his warranty. Beſides, it might happen that by the feoffment the tenant was bound only to the ſervice of a penny, while the ſuperior lord was bound by the feoffment he had made to the meſne lord, to the warranty of a hundred librates of land; and there is no doubt, but, in ſuch caſe, a lord would gladly renounce his claim of homage, if the law would permit him. Nor would it avail the lord to ſay, that the tenant was not infeoffed by him, and that he claimed nothing in the homage; for as there might be ſeveral ſuperior lords, ſo there might be ſeveral tenants one below another; and the chief lord of all held the loweſt tenant bound to him by the ties of homage, becauſe he was within his fee, though *per medium*; and when that *medius*, or meſne lord was taken away for any cauſe whatſoever, the connection between the chief lord of all and the inferior tenant became immediate; ſo that, one way or other, the inferior tenant was within the homage of the ſuperior lord[a]. To illuſtrate this by an inſtance: if I infeoff *A.* and *A.* infeoffs *B.* and *B.* infeoffs *C.* and ſo on; then every tenant, from the firſt to the laſt, would be my tenants, and I their lord; the only difference being, that the firſt would be immediate tenant, the others ſo *per medium*.

[a] Bract. 80. b.

WE

We have been ſhewing how the obligation of homage might ceaſe in the perſon of the lord, and remain in the perſon of the tenant. In like manner might the homage ceaſe in the perſon of the tenant and continue in that of the lord: as where the tenant parted with the whole inheritance, and infeoffed another to hold of the chief lord, then the tenant was abſolved from the homage; that is, the homage was wholly extinguiſhed as to him, whether the lord conſented or not, and commenced in the perſon of the alienee, who now was bound to the lord; and ſhould the feoffee re-infeoff the feoffer to hold of the ſame chief lord, the homage of the tenant would thereby be revived. The homage would ceaſe alſo when the tenant died without heirs, or committed any felony; in which caſes the tenement *eſcheated* to the chief lord. The tie of homage and fealty was likewiſe diſſolved, when the tenant diſavowed the ſervices by which he held, or denied that he held of the lord at all; in which caſe the lord had two remedies: he might either waive the forfeiture of the tenement, and proceed for the recovery of the ſervices; or avail himſelf of the tenant's default, and demand the tenement by a writ of eſcheat, or [b] by a writ of right. Should the tenant do any atrocious injury to his lord, or ſide with his enemy, by giving advice or aſſiſtance againſt his lord (except it was with the king, or the ſuperior lord of all, to whom he had done allegiance), or do any thing to the diſheriſon of, or put violent hands on, his lord; all theſe were breaches of faith which diſſolved the homage on the part of the tenant. It muſt be obſerved, that homage remained in force between lord and tenant as long as the heirs of both parties continued (which tenure was therefore, in after-times, called *homage auncęſtrell*); but upon the failure of any of them, the homage ceaſed, and could be revived in the perſons of others only by ſome new

[b] Bract. 81.

cauſe.

cauſe. A tenant might decline holding his tenement, and ſo diſſolve the homage: he might, ſays Bracton, alſo ſurrender the tenement and homage to the lord *propter capitales inimicitias*, and ſo diſſolve the homage, that he might be at full liberty to proſecute an appeal againſt him.

It ſeems, that, in general, the lord could not *attorn*, as they called it, or transfer to another the homage and ſervices of his tenant againſt his conſent, particularly the homage; for by ſo doing he might ſubject him to a perſon who was his declared and inveterate enemy. A ſlight enmity, however, was not an objection, where the law allowed, as it did in ſome caſes, ſuch an attornment even againſt the tenant's conſent. The moſt uſual way of attorning the homage was, on a fine in the king's court, where the homager was to be ſummoned to ſhew cauſe why the homage ſhould not be done to the other perſon; and if he could not ſhew ſufficient reaſon to the contrary, it would be attorned without his concurrence [c]. There were other inſtances, where homage might be attorned; as when land was given in marriage; when land was ſold for redemption of the lord's perſon; in both which caſes it might be attorned, unleſs any particular reaſon could be ſhewn to the contrary. This reſtraint upon the attornment of homage was founded on other reaſons beſides thoſe beforementioned; as homage was the bond by which the tenant claimed the warranty and *excambium* of his lord, it was right that the lord ſhould not have the power of transferring this obligation to another, who might be indigent, and not able to anſwer the warranty. This reſtriction was wholly in favour of the tenant, for whoſe benefit, indeed, homage ſeemed principally calculated; and if it was juſt that a lord ſhould not be at liberty to decline the homage of the tenant, it was equally ſo that he ſhould not attorn it without his aſſent.

[c] Bract. 81. b.

Although

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ALTHOUGH the law impoſed this reſtraint as to homage, yet ſervice might be attorned in all caſes without requiring the aſſent of the tenant; and the perſon to whom it was attorned might diſtrain for it, without the tenant being able to make any reſiſtance thereto[d]. In ſuch caſes, ſome thought, that ſhould the diſtreſs be for the homage and ſervice both, it ought to ceaſe as to the homage, though it held good as to the ſervice; diſtreſs being incident to ſervice, and belonging of courſe to the perſon who was entitled to the ſervice. Yet a tenant was not to be oppreſſed by an attornment of ſervice, any more than by an attornment of homage; it was adviſeable therefore for the tenant, in order to ſecure himſelf from any unreaſonable demands of his new lord, to get from him a charter, granting, that he would not demand more ſervices than were due, and charging himſelf with a warranty and *excambium*, in the ſame manner as the firſt lord was bound.

IF the lord refuſed to receive the homage, the tenant had ſeveral remedies. In the firſt place, the ſervice, which the tenant was not bound to without homage, was loſt to the lord; and ſhould homage be forced upon the lord by a judgment of court, the arrears of ſervice were ſtill loſt. If the homage was refuſed publicly by the lord, the tenant might attorn himſelf to the next ſuperior lord; and if he refuſed, to the next; and ſo on to the king, who was the chief lord of all; and if they all refuſed, the tenant was quit of all demands for ſervice. But ſhould any of them accept it, the immediate lord, who had refuſed it, could never recover the homage or ſervice; though he would, on account of his wilful refuſal, be ſtill bound to warranty, notwithſtanding the perſon to whom the tenant did homage had the ſervice[e].

WHEN a meſne lord had accepted the homage and fealty of his tenant, and received the ſervice, but had applied it

[d] Bract. 82. [e] Ibid. 82. b.

to

to his own uſe without acquitting him from the demands of the ſuperior, and this was proved in the preſence of good and lawful men; he might, in future, without any breach of law, ſatisfy the chief lord with his own hands, by doing his ſervice to him; and yet the meſne lord would not, on that account, be diſcharged from his warranty [f]. The remedy againſt the meſne lord, in ſuch caſes, was by writ *de medio*.

Relief.

AFTER homage was performed, the next thing for the heir to do, was to pay the relief; ſo called, ſays Bracton, becauſe thereby the tenement and inheritance which was in the hands of the anceſtor, *et quæ* JACENS *fuit per ejus deceſſum*, RELEVATUR *in manu hæredis*. The ſums to be given on theſe occaſions were ſettled by *Magna Charta* *, except in tenure by ſerjeanty, which was ſtill left to the diſcretion of the lord [g]. A relief was to be paid only in caſes of ſucceſſion, and never upon a change of tenant by buying or ſelling, or any other ſort of purchaſe [h]. It was to be paid to the next immediate lord, and no other: it was to be paid only once, and not upon the change of the lord; for though homage might be done ſeveral times, relief was to be paid only once [i]; ſo that the doubts expreſſed by Glanville on this head no longer exiſted [k]. Another gift was to be made to a lord by the heir when he ſucceeded his anceſtor, which was called a *heriot*. This was, however, in nothing like a relief; for it was given by all tenants, as well villain as free, and it rather came from the deceaſed than the heir: it was, ſays Bracton, when a man remembered his lord by the beſt beaſt, or ſecond beſt beaſt he died poſſeſſed of, according to the cuſtom of different places, and was rather *de gratiâ* than *de jure*; and, in fact, it related not at all to the inheritance [l].

[f] Bract. 84.
* Vid. ant. 235.
[g] Bract. 84.
[h] Vid. ant. 125, 126.
[i] Bract. 84. b.
[k] Vid. ant. 126.
[l] Bract. 86.

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Of wardſhip and marriage.

THE ſubject of ward and marriage is treated by Glanville, and by Bracton, principally in the ſame way, and ſometimes in the ſame words; we ſhall therefore touch upon ſuch parts only as are ſtated ſomewhat differently, or are diſcourſed upon more at large by Bracton.

THE age of female wards was contended by ſome to be at fifteen years complete, both in military and ſoccage tenure; for, as to the former, they ſaid, that ſhe might have a huſband who was equal to perform the military ſervice [m]; and therefore ſhe might, with propriety, be reckoned of age before ſhe was twenty-one years of age. But this opinion is combated by Bracton, who ſays, that the ſame principle might make her of age at an earlier period; and he therefore lays it down, that there is no diſtinction between male and female wards, in the reſpective tenures; and that it was only in the latter that females, (as we have before ſhewn of males) were to be conſidered as of age at fifteen years; at which time, ſays Bracton, a woman is able to manage her domeſtic concerns [n]; which is a ſimilar deſcription to that given by Glanville [o], and adopted by Bracton, of the qualifications of an heir in burgage-tenure: and the latter author mentions fifteen as the proper age for the infancy of a tenant in ſoccage to ceaſe, becauſe he was then able to attend to affairs of agriculture.

IT is laid down poſitively by Glanville, that if a perſon married his daughter and heireſs without the aſſent of his lord, he ſhould forfeit his inheritance; and that a widow who married without her lord's aſſent, ſhould in like manner forfeit her dower [p]. Theſe two points are re-

[m] Bracton ſays, another reaſon was given in favour of this early liberation from pupillage: *Fœmina magis doli capax eſt quàm maſculus, et maturiora ſunt vota mulieris quàm virî.*

[n] To this Bracton adds, that ſhe might *habere* COLNE *et* KEYE; which is thus explained by Spelman: COLNE *Saxonicè eſt* CALCULUS; KEYE, CLAVIS; *quaſi eò ſpectaret hic locus, ut fœmina congruæ ætatis haberetur, ſi* COMPUTUM *et* CLAVES *domeſticas valeret curare.* Spelman, voce. Bract. 86. b.

[o] Vid. ant. 114.

[p] Vid. ant. 116, 117.

cogniſed

cogniſed by Bracton as remnants of the old law, which had gone out of uſe. We have before ſeen what notice was taken of this cruel piece of law by *Magna Charta*; and it was now laid down by Bracton, that in both caſes the lord was only intitled to a penalty; the meaſure of which, however, he does not mention [q].

When an infant ſucceeded to inheritances that were held of different lords, the cuſtody of the lands belonged to the reſpective lords of whom they were held; but the cuſtody of the heir's perſon, and the marriage, which was the great ſource of emolument to the lord, could belong to one only; and there was ſome difficulty in aſcertaining who that perſon ſhould be. It is laid down generally by Glanville, that this ſhould be the chief lord of whom the heir held his firſt fee [r]; and that the king, by his prerogative, was intitled to certain preferences. The manner in which both theſe claims were adjuſted is more fully explained by Bracton.

As an exception to the prerogative, which gave to the king the cuſtody of the heir and his lands of whomſoever they were held by knight-ſervice, it is laid down, that if any held of the king *per fœdi firmam*, or in ſoccage, or in burgage, or by *ſerjeanty*, to perform the ſervice of finding him knives, or darts, or the like, the king ſhould not have cuſtody either of the heir, or of the lands he held of any one elſe; nor if he held of the king as of an honor or eſcheat; it being provided by *Magna Charta* [s], that the tenure in ſuch caſe ſhould remain the ſame as it was when in the hands of the former poſſeſſor; though, even in caſe of eſcheats, if the heir held under a new grant from the king, the king's prerogative to wardſhip would prevail. This prerogative of the king, therefore, prevailed in reſpect only of a tenant who held of him *in capite* by military tenure, or by a ſerjeanty to attend the king's perſon; and it only ex-

[q] Bract. 88. [r] Vid. ant. 115. [s] Vid. ant. 238.

tended

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tended to ſubject lands held by military tenure to the ward of the crown[t].

In ſoccage-tenure the wardſhip belonged to the next of kin, and not to the lord; and therefore, in general, if an heir had inheritances held in ſoccage of different lords, there could ariſe no queſtion about priority of feoffment, to aſcertain the right of wardſhip, as in military tenures; though it is ſaid by Bracton, that by ſpecial cuſtom in ſome places, and amongſt others in the biſhopric of Wincheſter, the lord had the wardſhip in ſoccage tenure, and in ſuch caſes, recourſe muſt of neceſſity be had to priority to determine who was chief lord; yet this preference was only againſt lords whoſe tenures lay within the reach of the cuſtom, and not againſt other perſons[u].

The firſt fee in many caſes, which conſtituted a perſon chief lord, and gave him the priority, was the fee that was firſt *delivered* to the heir. The lord was not to receive homage before he had *delivered* the inheritance to the heir: the wardſhip and marriage could not be demanded from the infant heir, any more than relief, or any ſervice could from the heir of full age, before homage; the delivery, therefore, of the inheritance was the firſt ſtep towards acquiring a right to the wardſhip and marriage, and the receiving of homage completed the claim. It follows from hence, that as long as the homage of the anceſtor had continuance, no delivery was to be made of the inheritance, and that homage continued during the anceſtor's life, unleſs he had made any transfer of the land which broke the homage. Every transfer had not that effect. Thus, if a perſon holding by military ſervice and homage, granted the land to his ſon and heir for life, to hold either of himſelf or of the chief lord, the homage ſtill continued between the father and the chief lord; but it would

[t] Bract. 87 b. [u] Ibid. 88.

have

have been broken, if the father had parted with the whole inheritance.

THE ceasing of the homage and the delivery of the inheritance will be better understood by considering the following cases. Suppose *A.* having an inheritance, married *B.* having one also; both held of the same lord. They have a son. *A.* dies, leaving his wife *B.* alive: the inheritance of *A.* might be delivered to the heir by the lord, who would, in consequence, be entitled to homage, ward, and marriage. But if *B.* the wife had died, leaving *A.* alive, it would be otherwise; because the homage done by *A.* in the name of his wife still continued; for it could not be dissolved during his life, as he was intitled to hold the land *per legem Angliæ*: the heir of *A.* therefore continued in the power of the father, during whose life he owed no homage to the lord; as two homages could not be done for the same land. And so it was, where-ever the heir was descended both from the husband and wife; but it was otherwise, where there was a second marriage, and he was descended only from one. As for instance, if the wife only had an inheritance, and the husband died first, leaving an heir, the inheritance could not be delivered during the life of the wife; and of course the lord would not have wardship and marriage: so if she married one or more husbands, there was still to be no delivery; and, of course, no ward or marriage, as long as she or any of her husbands lived: the same, if the wife died, leaving any husband alive: but as soon as the surviving husband died, then the inheritance might be delivered to the heir of the deceased wife by her first husband, and ward and marriage would follow.

THUS, as the preference depended upon the delivery of the inheritance, and that upon the death of the person in seisin, it might happen that the death of the husband and wife might fall so near as to leave a difficulty in determining which died first. In such case they used to recur, as

in

in Glanville's time, to the firſt feoffment, and diſregard the priority of delivery; and ſo they did, when the inheritance on the part of the father and that on the part of the mother were held of different lords, and were united in the perſon of the heir[w].

THE guardian in ſoccage had the marriage of the heir and all other caſualties and profits of wardſhip the ſame as the guardian in military tenure; and what is very remarkable, the right of the guardian in ſoccage was ſo much conſidered, that the law allowed the *apparent* next of kin to take, notwithſtanding he was a baſtard and illegitimate[x]. This made a guardianſhip in ſoccage as great an object as that in military tenure, and the ſtruggle for the marriage of the heir did not lie only between the different lords of whom he held in military tenure, but, if he alſo held any ſoccage lands, there might be a conteſt between the lord in military tenure, and the perſon who was intitled to be guardian in ſoccage. When, therefore, land in military tenure deſcended from the father, and land in ſoccage from the mother, or *vice verſâ*, and they both centered in the ſame heir, the marriage of the heir was decided, ſays Bracton, by priority, in the manner before-mentioned[y]. But if lands in ſoccage and in military tenure deſcended from the ſame anceſtor; then, notwithſtanding the ſoccage might be of the prior feoffment, yet the privilege of military tenure prevailed, and the lord of thoſe lands would exclude the next of kin, and have the ward and marriage[z].

THUS was the perſon of the infant heir made a property of either by his guardian in chivalry or in ſoccage: the diſpoſal of the heir in marriage might be ſold to the beſt purchaſer, like the fruits and profits of his lands. We ſhall ſoon ſee *, that the legiſlature made ſome proviſion againſt this oppreſſion, in the caſe of guardians in ſoccage; but the others were rather ſecured in their rights by another

[w] Bract. 89. b. [x] Ibid. 88. [y] Ibid. 88. b. [z] Ibid. 91. * Stat. Marlb.

proviſion

proviſion of this reign, which made void all conveyances of the inheritance to the heir in the life of the anceſtor; a practice by which tenants in chivalry endeavoured to avoid the claim of ward and marriage [a].

Of gifts of land:

HAVING conſidered the terms and conditions on which landed property might be held, the next object which naturally preſents itſelf, is, the manner of acquiring a title to property: and this was of three kinds; by *gift*, by *ſucceſſion*, and by *will*. We ſhall conſider theſe three in their order, beginning with the firſt [b]. A gift of land might be conſidered in various ways; either as, what is called by Bracton, *libera et pura donatio*, or that which was *ſub conditione*; and, in another reſpect, ſuch as was *abſoluta et larga*, or that which was *ſtricta et coarctata* to certain particular heirs, with an excluſion of others. Theſe will be treated of more minutely hereafter; when we have firſt enquired what perſons were capable of making gifts of land, and what not.

By whom:

THE perſon who was regularly and properly intitled to make a gift of his land, was he who was ſeized in fee; but yet ſome others who had an inferior intereſt, could, to a certain degree, make a gift; as any one who had a freehold, though only for life; and even ſuch as had no freehold; as one who had a term for years, or the wardſhip of land: and indeed thoſe who had no lawful title; as one who was in ſeiſin by intruſion or by diſſeiſin, might, ſays Bracton, convey a freehold, though it was not a complete and indefeaſible one. A gift made by a minor, or a madman, would be good, if confirmed after the one was of age, and the other had become of ſane memory [c]. Thoſe who could not make a gift, were ſuch as had not a general and free diſpoſal of their property: ſuch was the condition of minors, who were *ſub tutelâ vel curâ*; yet theſe could accept a gift with conſent of their tutor, as the

[a] Vid. poſt. Stat. Marlb. [b] Brac. 10. b. [c] Ibid. 11. b.

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law allowed them to meliorate their condition, though not to leſſen it by making a gift, even with conſent of their tutor: the ſame of a perſon deaf and dumb; a perſon taken priſoner by an enemy, while in the enemy's cuſtody; or a leper removed from the converſe of mankind. Others were incapacitated *ſub modo*. Thus archbiſhops, biſhops, abbots and priors, could not make gifts without the aſſent of the chapter; nor the chapter without the aſſent of the king, or other patron, whoever he might be; the concurrence of all, whoſe intereſt was concerned, being abſolutely requiſite. Rectors of churches, as they poſſeſſed nothing but in the name of their churches, could make no alienation thereof but by conſent of the biſhop *or* patron[d]; nor even make any change therein for the better[e]. Bracton lays it down, that a baſtard could not give his land unleſs he had heirs of his body, or he had made lawful aſſigns thereof, conformably with the terms of the donation. This reſtriction on the alienation of a baſtard ſeems to have been impoſed in favour of the lord, who, as the law now ſtood (though it was otherwiſe in Glanville's time), would, on failure of heirs, ſucceed by eſcheat. For a ſimilar reaſon no one charged with felony could alien his land with effect, though the gift would hold *till* he was convicted, and if he was acquitted would be valid. All gifts between a huſband and wife were void *; nor could a huſband give his land to another, to be conveyed by the donee to his wife in his life-time, or after his death, as that would be a fraud upon the letter of the law.

To whom.

THUS far of the perſons who might make a gift of land; next of thoſe *to whom* a gift may be made. A gift, as has been before ſaid, might be made to a minor; and in ſuch a caſe, a *tutor*, or *curator*, uſed to be appointed to accept and take care of ſuch gift; but the law did not

[d] So Bracton reads. Quere, if it ſhould not be *and*?

[e] Bract. 12.

* Vid. ant. 91. 111.

allow

allow the feoffor to appoint such tutor[f]; for that, says Bracton, would seem like a continuance of the seisin, instead of making a feoffment of it. A gift might be made to a Jew, unless the original charter had a clause which forbid such an alienation; it being very common in those days to add to the clause of assignment *exceptis viris religiosis, et Judæis*: it seems, that Jews were not by law incapacitated from taking gifts of land, except in these particular cases[g]. If a gift was made by a man to his wife and his children, or her children begotten of another husband, the gift, though void as to the wife, would hold as to the others.

It has before been said, that a person might give what he had in fee, for life, or for years; to which may be added, that he had this power, whether he was seised to himself solely, or in common with another. He might also give that which he had in expectancy after the death of his ancestor, who held it in fee. He might give what he had granted before to another for a term of years, with a saving to the farmer of his term; because these two possessions could very well consist with each other, so as one should have the freehold, and the other the term.

It has before been shewn, that these gifts might be of greater or less extent and duration; they might be in fee, for life, in fee farm, for term of life, or for term of years. Where a gift was for life, whatever the circumstances might be, the donee had immediately *liberum tenementum*, or, as it has since been called, *a freehold interest*, so as to have an assise, if he was ejected; and such a donee might, as has before been said, make an imperfect donation in fee, or for life; so great consideration did the law bestow on a freehold of any sort[h].

[f] Bract. 12. b. It is to be regretted that Bracton has not informed us by whom he was to be appointed.

These terms of *Tutor* and *Curator* are borrowed from the civil law, and the appointment of them to protect property given to an infant is adopted from the same source. Inst. lib. 1. tit. 13. et sequent.

[g] Bract. 13.

[h] Ibid. 13. b.

To ascertain that gifts were actually made by the parties whose names were to the deed of gift, and that they were in a capacity to manage their affairs, a writ was framed requiring the sheriff to make inquisition whether the donor was *compos sui*; which writ was either to be executed before the sheriff, and guardians of the pleas of the crown, or before the justices at Westminster [i]. There was another writ, to enquire if it was the donor's seal, or was really affixed to the charter by him; and if, upon enquiry, any one was charged with a fraud respecting the gift, he was summoned to answer for it [k]. All gifts should be free, and without compulsion; and therefore, should it be proved that any coercion was used with the donor, the gift was revoked; but if the donor dissembled the force, and did not complain of it till some length of time, he would not be permitted afterwards to invalidate the gift by such a suggestion. If it was in time of war, he was to make a declaration thereof as soon as peace was restored; if in time of peace, then, says Bracton, as soon as he had escaped from the dures, he was to raise a hue and cry after the parties; and in either of these cases, he would be considered by the law as having done all in his power [l].

Of simple gifts.

HAVING premised these observations concerning the capacity of persons to become donors and donees; the next subject is the donation itself. It has been said that donations were, some of them, simple and pure; that is, where no condition or modification was annexed. The following is a pure and simple gift of land, and, as it was the common form of gifts or feoffments at this time, is very well worthy of notice: *Do tali tantam terram in villâ tali, pro homagio et servitio suo, habendam et tenendam eidem tali et hæredibus suis de me, et hæredibus meis tantùm, ad tales terminos, pro omni servitio, et consuetudine seculari, et demandâ; et ego et hæredes mei warrantizabimus, acquietabimus, et de-*

[i] Bract. 14. b. [k] Ibid. 15. [l] Ibid. 16. b.

*fendemus*

*fendemus in perpetuum prædictum talem, et hæredes ſuos, verſus omnes gentes per prædictum ſervitium, &c.* A gift like this, *tali et hæredibus ſuis*, was to be underſtood in the large ſenſe of the term *hæres*, and as comprehending all heirs, both near and remote[m]. Another way of enlarging this clauſe was, *tali et hæredibus ſuis, vel cui terram illam dare vel aſſignare voluerit*, with a clauſe of warranty co-extenſive with ſuch a donation. In ſuch caſe, if the donee aſſigned and died without heirs, the donor was bound to warrant the aſſignee; which could not be without ſuch an expreſs engagement in the deed of gift; ſo that the expreſs mention of aſſignees ſeemed neceſſary to give a complete power of alienation.

As a gift might be made largely, ſo it might, as before ſtated, be *coarctata*, and confined to particular heirs; as, *tenendam ſibi, et hæredibus ſuis* QUOS DE CARNE SUA ET UXORE SIBI DESPONSATA PROCREATOS HABUERIT; or, *tali et uxori ſuæ*, or *cum tali filiâ meâ, &c. tenendam ſibi et hæredibus ſuis de carne talis uxoris*, or *filiæ exeuntibus, &c.* In theſe caſes the inheritance deſcended to the particular heirs there ſpecified, to the excluſion of all others. If a perſon ſo infeoffed ſhould infeoff any other, the heirs would be bound to warranty; for though ſome had endeavoured to maintain that they took together with their anceſtor, yet Bracton denies it, and ſays, they only took by deſcent. And ſhould the perſon ſo infeoffed have no ſuch heirs, or they ſhould fail, the land would revert to the donor by a tacit condition, without any mention thereof in the gift.

THE conſtruction of law upon the eſtate and intereſt of ſuch donees was, that, in the firſt of the above caſes, ſhould there be no heir, the land given would be a freehold in the donee, but not a fee; in the ſecond, it would be a freehold till heirs were born, and then it would become a fee; and when they failed, it would again become

[m] Brad. 17.

only

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only a freehold. Thus, we ſee, it was at the pleaſure of the donor, at the creation of the gift, to modify it as he pleaſed, however contrary to the general diſpoſition the law would make thereof; in which inſtances the maxim, that *conventio vincit legem*, was the principle which governed: and this was not only in preſcribing what heirs ſhould inherit, but alſo in the ſervice to be performed; which, as has been ſeen before, was in the breaſt of the feoffor to order as he liked, ſo as he warranted his tenant againſt the chief lords [n].

Of conditional gifts.

WE have hitherto ſpoken of the heirs that were pointed out by the will of the donor to ſucceed to the inheritance. We ſhall next take notice of the conditions and modifications under which the inheritance was to be enjoyed; and theſe imported ſometimes a burthen, ſometimes a benefit, to the donee, and were of different kinds. Thus a gift might be, *tenendum ſibi et hæredibus ſuis*, SI *hæredes habuerit de corpore ſuo procreatos*: where, if the donee had heirs of his body, though they afterwards failed, yet he had ſatisfied the condition, and all his heirs, without diſtinction, became entitled to inherit: but if no ſuch heir had been born, the land given would have been only a freehold, and would return to the donor, to the excluſion of the heirs general, becauſe the condition had not been fulfilled. If a gift was *viro et uxori, et hæredibus uxoris*; or, *viro et uxori, et hæredibus viri*; or, *viro et uxori et hæredibus communibus*, SI *tales extiterint, vel* SI NON *extiterint, tunc ejus hæredibus qui alium ſuperviverit*; theſe were all *ſub modo*. Others were *ſub modo*, and alſo *adjecta conditione*; as, *Do tibi tantam terram, ut det mihi tantum*; or, *ut mihi inveniat neceſſaria*. Theſe gifts, though not wholly gratuitous, yet, Bracton ſays, were *ſimplex et pura*; and if livery was given thereon, they could not be revoked, though the condition was not performed, unleſs there had

[n] Brad. 17. b.

been

been an expreſs covenant entitling the donor to enter for breach of the condition [o].

THE limitation of eſtates went much farther than what has yet been ſtated. A perſon would make a gift to his eldeſt ſon *A. tenendum ſibi et hæredibus ſuis de corpore ſuo procreatis*; and if he had no ſuch heirs, or they ſhould fail, then to his ſecond ſon *B.* to whom he directed it to revert, to have and to hold to him in the ſame manner; and upon like failure to *C.* his third ſon, in the like way; and ſo on: and if the ſaid *A. B.* and *C.* all died without ſuch heirs, the land to revert to the donor and his heirs; which laſt was unneceſſary, as the law would, of courſe, give the reverter to him. Other gifts were as large as the former was confined; as, *tenendum tibi et hæredibus tuis, vel cui dare, vel aſſignare in vitâ, vel in morte legare volueris.* A regard to the will of the donor induced them to ſupport ſuch gifts; for Bracton lays it down, that if the legatee got the ſeiſin, and an aſſiſe was brought againſt him by the heir, he might plead the form of the gift, and it would be a bar [p]: ſo that the reſtraint upon gifts of land by will, which ſeemed one of the ſtricteſt points in the law of landed property, might be diſpenſed with by the ſpecial form of the original gift.

INNUMERABLE were the conditions upon which gifts might be made. Some of theſe were conditions precedent, and ſome ſubſequent, to the veſting of the eſtate given: ſome of them were ſupported by law, and ſome not; and various were the reaſons given why they ſhould not be ſupported. A few inſtances of this kind will ſerve; as, *Do tibi talem terram, ſi Titius voluerit; ſi navis venerit ex Aſiâ; ſi Titius venerit ex Jeruſalem; ſi mihi decem aureos dederis; ſi cœlum digito tetigeris*; and the like [q]; ſome of which were accompanied with an expreſs condition of reverter on failure in performing the terms on which the gift was made, and ſome not.

[o] Brac. 18. a. b. [p] Ibid. 18. b. [q] Ibid. 19.

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THE courſe of deſcent was entirely under the controul of the donor in making the gift. A gift was ſometimes made to a perſon for a term of years, and after that term to revert to the donor; with an agreement that if the donor died within the term, the land ſhould remain to the donee for life, or in fee, as it might happen. Thus a freehold and fee might be raiſed by a condition; and in the ſame manner might be changed into a term; for when a gift was made for life, it might be added as a condition, that, ſhould the tenant die within a certain time[r], his heirs, tenants, aſſigns, or executors, ſhould retain the land for a certain term after his death. When land was given to a creditor *in vadium*, it was ſometimes agreed, that if the money was not paid at an appointed day, he ſhould hold it to him and his heirs. Gifts were often made for a term of years, yet ſo as to be reſtored to the donor, if he ever returned into the kingdom; but if he died in his voyage, or did not return, to remain to the termor in fee; upon the performance of which condition the term ceaſed, and the fee commenced[s].

IN all gifts *in maritagium*, or to a *baſtard*, there was an expreſs or tacit condition of reverter. If land was given to a baſtard in marriage with a woman, it was always either to them *et hæredibus eorum communibus*, or, *hæredibus ipſius uxoris tantùm*. In the former caſe, there was, by a tacit condition in the gift, a reverter to the donor, upon failure of common heirs: in the latter, if ſhe had heirs by the baſtard, the land went to them: if ſhe had none, it deſcended to other heirs of the wife, whether born of another huſband, or collateral. Suppoſe land was given to a baſtard ſolely, without his wife, *ei et hæredibus ſuis*, or *ei et aſſignatis ſuis*; in the former caſe, upon failure of heirs, whether homage had been done or not, the land, contrary to the uſage in Glanville's time[t], eſcheated for want of

[r] Bract. 19. b. [s] Ibid. 20. [t] Vid. ant. 119.

heirs;

heirs; in the latter, if he had made an alienation, it was good, though there was a failure of heirs[u]. If a baſtard had a brother, that brother could not take from him by deſcent.

LAND was ſometimes given before the eſpouſals by ſome relation of the wife to the huſband with his wife, or to both of them; as, *tali viro et uxori ſuæ, et eorum hæredibus*, or *alicui mulieri ad ſe maritandum*, or ſimply, without any mention of marriage; but if there was mention of marriage, then the land ſo given was called *maritagium*. A *maritagium* uſed to be given either before, or at the time of, or after, the matrimonial contract. *Maritagium* was, as has been ſaid before[x], of two kinds: it was *free*, or *not free*; the particulars of which diſtinction were now more minutely ſet forth, than in the time of Glanville. *Liberum maritagium* was, where the donor was willing that the land ſhould be quit and free from all ſecular ſervice[y] belonging to the lord of the fee, ſo as to perform no ſervice down to the third heir incluſive, and the fourth degree. The degrees were computed in this way: the donee made the firſt, his heir the ſecond, his heir the third, and the heir of the ſecond heir the fourth. The heirs were computed thus: the ſon or daughter of the donee was the firſt, the ſon or daughter of them the ſecond, and their ſon or daughter the third; which third heir was to do homage and perform the ſervice. As there was a reverter to the donor, on failure of heirs, there was to be no homage in theſe gifts; but ſhould thoſe in the right line fail, the land would go to the remoter heirs, if the form of the gift allowed it[z].

THESE gifts were made in different ways. If land was given *tali filiæ meæ ad ſe maritandum*, without mention of heirs, this conveyed only a freehold, and not a fee; and therefore, after the death of the wife, it reverted to the do-

[u] Bract. 20. b. Vid. ant. 299. [x] Vid. ant. 121. [y] Bract. 21. [z] Ibid. 21. b.

nor

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nor; nor had the husband any claim upon it *per legem Angliæ*[a]. If it was *ad se maritandam, et tenendam sibi et hæredibus suis*, generally; then, though she had no heirs of her body, the remoter would be called in, and the husband would possess it *per legem Angliæ*. If it was confined to particular heirs, it reverted on failure of such heirs. Thus, if it was to the common heirs of the husband and wife, and they had a daughter, and the husband died, and the widow married again and had a son, the daughter would be preferred to the son; though it would be otherwise, had the gift been to the wife only, and the heirs of *her* body[b].

Estates by courtesy.

THE right of a husband to retain the land of his deceased wife *per legem Angliæ*, is defined by Glanville and Bracton in the same manner, except that the former * states it as if confined to estates given with the woman *in maritagium*: if so, this claim had now extended itself; for Bracton says, the husband should have the land if he married a woman *habentem hæreditatem, vel maritagium, vel aliquam terram ex causâ donationis*, having any *inheritance*, whether a *maritagium* or other gift of land[c]. He agrees likewise with Glanville, that the second husband was equally intitled with the first. It seems, one *Stephanus de Segrave*, whose name we find among the justices itinerant in this reign, had written a treatise, in which he had combated this opinion, as founded on a misconception of the meaning and design of this sort of estate. He thought there was an injustice in giving an estate *per legem Angliæ* to the second husband, more especially when there were children alive of the first marriage.

THE crying of the child, which was a necessary circumstance towards establishing a title to this estate, was to be proved *per sectam sufficientem*, consisting of persons who heard, with their own ears, the cry; and not by those who

[a] Bract. 22. b. [b] Id. ibid. * Vid. ant. 122. [c] Ibid. 437. b.

had

had it by hearſay. The cry was only an evidence of the child being born alive; but this evidence was more regarded than any teſtimony of midwives or nurſes, who might be induced, by various motives, to give falſe teſtimony; and no proof of the child being born alive, and chriſtened as ſuch, would be received in lieu thereof. So rigid were the lawyers of thoſe days in exacting this only proof of life, that where the child was born deaf and dumb, they pronounced, *tamen clamorem emittere* DEBET, *ſive maſculus ſive fœmina;* which expectation had been thrown by the lawyers of thoſe days into a ſingular monkiſh verſe*. If the child was a monſter, and, inſtead of a *clamor*, uttered a *rugitus*, as Bracton expreſſes it, it would not ſatisfy the requiſite of the law, much leſs would a birth that was ſuppoſititious [d].

THE tenant *per legem Angliæ* was to have all incidents that happened, whether in ſervices, wards, reliefs, or the like, during his life; but if any land, or inheritance, fell in after the death of the wife, ſuch acceſſion went to the heir, if of age; if not, to the chief lord who had cuſtody of him; as likewiſe did the wards and the like; it being a rule, that the huſband ſhould retain nothing that did not accrue in the life-time of the wife.

AMONG other impediments to the huſband claiming this eſtate, Bracton reckons that of having *machinatus in mortem uxoris;* and this, he ſays, would be a good plea to bar him of his right. If no heir was born of the marriage, and the huſband held poſſeſſion by force, after the death of the wife, the next heir might have the following writ, which is recorded to have been framed for one *Ranulphus de Dadeſcomb* by *W. de Ralegh*, a name often found among the juſtices of this period. *Rex vicecomiti ſalutem. Oſtendit nobis A. quòd cum B. et C. uxor*

* The verſe is as follows:
*Nam dicunt e vel a quotquot naſcuntur ab Evâ.*
[d] Bract. 438.

*ejus*

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*ejus tenuiſſent tantam terram, &c. ut jus, et hæreditatem ipſius C. quæ nuper obiit ſine hærede de corpore ſuo procreato (ut dicitur), unde terra illa deſcendere debuit ad prædictum A. ſicut ad propinquiorem hæredem ipſius C. quia prædicta C. ſine hærede de corpore ſuo procreato deceſſit; idem B. poſt mortem prædictæ C. uxoris ſuæ contra legem et conſuetudinem regni noſtri cum vi ſuâ ſe tenet in eâdem, ita quòd prædictus A. in prædictam terram, ut in jus et hæreditatem ſuam, ingreſſum habere non poteſt. Et ideo tibi præcipimus, quòd ſi prædictus A. fecerit te, &c. tunc ſummoneas, &c. prædictum B. quòd ſit coram juſtitiariis, &c. oſtenſurus quare deforceat eidem A. prædictam terram, et habeas ibi, &c.*[e] which ſeems to be the moſt ſimple form of a writ of entry; a ſpecies of writs which had lately grown into vogue, and of which more will be ſaid in the proper place.

Of reverſions.

HAVING ſaid thus much of eſtates which reverted to the donor upon a condition expreſſed or implied, it may be requiſite to conſider the effect and conſequence of ſuch a reverter or reverſion. The reverſioner, ſays Bracton, was conſidered neither *pro hærede* nor *loco hæredis*; nor was he bound to warrant any thing done by the donee, except the appointment of dower; and this only where the donation was pure, without any condition or modification whatever. Land reverted not only for a failure of heirs or aſſigns, but in caſe of felony committed by the tenant, which threw a perpetual impediment in the way of deſcent; in which inſtance, it might happen that the donor had made a reſervation of the ſervices to himſelf, which made him lord, and then he took it as an eſcheat. In ſuch caſe he was deemed *in loco hæredis*, and was accordingly bound to warrant whatever was completed by the donee before the felony; as any gift or demiſe for a term, provided the act was complete; for if it was not, as, from the nature of the thing, was the caſe in dower, it would not avail after a conviction for felony; nor was the donor, though he came *in loco hæredis*, bound to warrant it[f].

[e] Bract. 438. b. [f] Ibid. 13.

We

Gifts *ad terminum.*

We have hitherto been ſpeaking of eſtates given to a man and his heirs; but land was ſometimes given *ad terminum* or *ad tempus*, for a term; as for a [g] term of life, or years; that is, the life of the grantor, or grantee: or for a time; as where a gift was "till proviſion was made for the donee." In gifts of this kind it was important whether there was only mention that the donor ſhould make proviſion, without ſaying any thing of his heirs, or both the donor and his heirs were included; and whether it was to be for the donee only, or the donee and his heirs. If the donor's heirs were not included, and no proviſion was made in the life of the donor or donee, the land remained in fee to the donee; but if proviſion was made in their lives, the land reverted to the donor by the form of the gift. If the heirs of the donor only were included, and not thoſe of the donee, and neither the donor nor his heirs provided for the donee in his life, the land remained to the donee and his heirs in fee, although the heir of the donor or the donor himſelf was ready to provide for the heirs of the donee, after the donee's death. But if, on the other hand, the heirs of the donee and thoſe of the donor were mentioned, and the donor provided for the donee, or his heirs, the land reverted to the donor; and ſhould the donor have made no proviſion in his life-time, it was not ſufficient that his heirs were ready to do it, becauſe the form of the gift required it to be otherwiſe. If there was no mention of heirs at all, then ſhould the donor make no proviſion for the donee during their joint lives, the law was, that the land ſhould remain in fee to the donee. If land was given for the life of the donee, and not of the donor, nor in fee, then it was conſidered as a freehold in the donee: if the reverſe, then the law conſidered it as the freehold of the donor, and not of the donee, becauſe it might,

[g] This was called a holding *ad firmam*, and the perſons ſo holding were called *firmarii*. *Ferme*, in the Italian, ſignifies a *bargain* or *contract*.

if

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if the donor died firſt, be revoked in the life of the donee, and revert to the heirs of the donor. Again, if a gift was made for the life of the donor to the donee and his heirs, then, ſhould the donee die firſt, his heirs would hold it for the life of the donor, and they could recover in an aſſiſe of mortauncestor, ſtating that their anceſtor died ſeiſed *as* of fee[h]: and if the donor died firſt, then, for the reaſon above given, it became the freehold of the donor and not of the donee. If there was no mention of heirs of the donee, yet the land needed not immediately, in ſuch caſe, revert of courſe to the donor; for the donee might, if he pleaſed, make a teſtament of it, as of any chattel; and ſuch a will, according to Bracton, was good in law.

If a gift was made by a man for him and his heirs without naming the heirs of the donee, and without ſaying expreſsly it ſhould be for life, yet the land became the *freehold* of the donee as long as he lived. But ſhould a gift be made *ad terminum annorum*, for a term of years, however long, even though it exceeded the uſual length of man's life, yet the donee did not by ſuch a gift obtain a *freehold*; becauſe a term of years was a certain and determinate period, and the term of life uncertain; the uncertainty of the determination of the eſtate being what Bracton ſeems to conſider as abſolutely neceſſary to conſtitute a freehold-intereſt. A term of years was treated as an intereſt that did not at all impede any further diſpoſition of the land ſo held; for the perſon who let it, might within the term make a gift of the land to another, or to the ſame perſon in fee. If it was to the farmer, one ſort of poſſeſſion would be thus changed into another; if to another, the poſſeſſion of the farmer would ſtill remain unimpaired; for a term and a feoffment of the ſame land might conſiſt very well together. In ſuch caſe, there

[h] Brac. lib. 4. b

would

would be different and distinct rights. To the feoffee would belong the property of the fee and the freehold; the farmer could claim nothing but the usufruct, that is, to enjoy the use and produce freely during his term, without any obstruction from the feoffee.

LAND, says Bracton, might be given *at the will* of the giver, and so on as long as he pleased, *de termino in terminum*, and *de anno in annum*; under which lease the person taking had no freehold; the owner of the *proprietas* could at any time reclaim it, as being nothing in law but a precarious possession[i].

ANOTHER sort of gifts was to cathedral, conventual, and parochial churches, and religious men. These were said to be *in liberam eleemosynam*. They were sometimes *in liberam et perpetuam eleemosynam*; in which cases, the donee was not excused from the burthen of service: but if the gift was what they termed *in liberam, puram, et perpetuam eleemosynam*, then he was; and the donor and his heirs were bound to warrant the donee against all claims of the chief lord[k].

THE next subject is the consideration the law had of the several before-mentioned gifts; all which were imperfect, till possession or seisin was given to the donee. The degrees of possession made a subject of very minute distinction and refinement at this time, and is discoursed on by Bracton[l] at length. It is sufficient to say, that the completest possession which could be had, was, when the *jus*, and *seisina*, the title to the land, and the seisin of it, went together; for the donee had then *juris et seisinæ conjunctio*; the highest of all titles[m]. But this could not be obtained without a formal *traditio*, or *livery*; for land was not transferred by homage, nor by executing charters or instruments, however publicly they might be transacted, but by the donor giving full and complete seisin thereof to

Livery.

[i] Bract. 27. b. [k] Id. ibid. [l] Id. 38. b [m] Id. 39 b.

the

the donee, either in perſon or by attorney. This was by publicly reading the charter (and if livery was made by attorney, by reading the letters of attorney) in preſence of the neighbours, who were called together for that particular purpoſe; upon which the donor retired from the poſſeſſion, both *corpore et animo*, without any intention of returning to it as lord; and the donee was put into the vacant poſſeſſion, *animo et corpore*, with a reſolution of retaining poſſeſſion; in ſhort, one party ceaſed, and the other began to poſſeſs it: for the donor never ceaſed to poſſeſs till the donee was fully in ſeiſin; it being a rule of law, that the ſeiſin could not remain vacant for the minuteſt ſpace of time. This is the account given of livery by Bracton, who adds this definition of it: *de re corporali de perſonâ in perſonam de manu propriâ vel alienâ* (that is, of an attorney) *in alterius manum gratuita tranſlatio*. And if livery was thus made by the true owner of the land, the donee had immediately the freehold by reaſon of the *juris et ſeiſinæ conjunctio*[n].

THERE were ſome caſes where livery was not neceſſary, and any expreſſion of the owner's will, that the property ſhould be changed, had the ſame effect as livery: thus, where land was lett for a term of life, or years, and afterwards the donor ſold or gave it wholly to the donee, it became the property of the donee immediately: the ſame where a perſon was in poſſeſſion by diſſeiſin or intruſion[o]; the law allowing, in theſe caſes, a fiction to ſupply the fact of the land having really paſſed out of one hand into the other.

WHEN a livery was made, it had the effect of conveying to the perſon to whom it was made, every thing the maker of it had: whether he had a mere right and property of the fee, a freehold, or uſufruct, it all belonged to the donee. But for this purpoſe, it was not ſufficient that the

[n] Brac. 38. b. [o] Ib. 40. b.

donee

donee came into the occupation of part of the land; for if any perſon belonging to the donor remained on another part, he thereby retained the whole, notwithſtanding the livery: and it was abſolutely neceſſary towards completing the livery, that the donor and every one belonging to him ſhould leave the land. If the perſon making livery had only the uſufruct, yet he thereby gave to his feoffee a freehold, as far as concerned himſelf, and all others who had no right, though *not* as againſt the true owner. If he had nothing, nothing he could give; yet if a perſon was only in poſſeſſion, let that be as inferior as might be, it is clearly laid down by Bracton, that he could give a *precarious* fee and freehold by livery [p]. As livery might be made either by the donor in perſon or his attorney, ſo it might be accepted either by the donee or by his attorney [q].

Land might be transferred not only by a legal title, and livery thereon, but without title or livery at all, namely, *per uſucaptionem*; that is, by continual and peaceable poſſeſſion for a length of time; yet what length of time was neceſſary to give ſuch a right, was not defined by the law, but was left to the diſcretion of the juſtices [r]. Thus all intruders, diſſeiſors, farmers holding over their term, perſons continuing in poſſeſſion contrary to a covenant or the original form of the gift, if they were ſuffered to remain in that condition without any interruption for a length of time, gained a right and freehold. Though this was the law amongſt ſubjects, in order to avoid dormant and litigious claims, yet in the caſe of the king it was otherwiſe; the maxim of *nullum tempus occurrit regi* having already obtained in his favour [s].

[p] It is worthy of remark, that this piece of old law was reconſidered, and after long diſcuſſion confirmed, 500 years after Bracton wrote, in a famous caſe in the King's Bench. Vid. Burr. Rep. 60.

[q] Bract. 41. b.

[r] Ibid. 51. b.

[s] Ibid. 52 and 103.

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We have hitherto been ſpeaking of *corporeal things*. It follows, that ſomething ſhould be ſaid of *incorporeal*, and the methods of transferring them. Theſe were called *jura* and *ſervitutes*, or *rights*; and being things neither viſible nor tangible, could not paſs by livery: they therefore paſſed by agreement of the parties contracting[t], and by a view of the corporeal thing to which they belonged; thus, by a fiction of law, they became what was called *quaſi*-poſſeſſed; and he who was ſo in poſſeſſion by fiction of law, had a *quaſi*-uſe till he loſt the poſſeſſion by violence or by non uſer: for as poſſeſſion of a corporeal thing could be loſt by non uſer, ſo could a *quaſi*-poſſeſſion of an incorporeal thing. But when there was an actual uſer of an incorporeal thing, the poſſeſſion was retained by the uſer, and became real, inſtead of fictitious; and when a perſon had thus made uſe of his right, he might transfer the right and the uſe to another, which before uſer he could not. If a perſon, however, who had an incorporeal right to him and his heirs, died without any uſer thereof, the title would deſcend to his heirs.

Rights.

These rights were generally conſidered as, and were called, *appurtenances* to ſome corporeal thing, as to a farm or tenement; and were commons, rights of advowſon, and the like[u]. An advowſon and common were ſometimes not appurtenant to any thing, but ſubſiſted as independent rights[x]. Of a nature ſimilar to theſe were other incorporeal things, which were given by the king only, as liberties and franchiſes; ſuch as juriſdiction and judicature, treaſure-trove, waifs, tolls, exemption from tolls, and numberleſs other royalties, which were granted by charter from the king to the ſubject[y].

Besides the gifts above-mentioned, which being tranſactions between man and man, were to take effect immediately, there was another ſort, which was to take effect

[t] Bract. 93. b. [u] Ibid. 54. [x] Ibid. 54. b. [y] Ibid. 55. b.

after

after the donor's death: such a gift was called *donatio mortis causâ*. A gift of this kind was generally made by a person in sickness, or going upon a voyage, and had in it a tacit condition, that it should be revocable upon the recovery or return of the giver. Should a gift not be accompanied with this condition, it was a *donatio inter vivos*; and therefore, if made between husband and wife, was void. A *donatio mortis causâ* was confirmed by the death of the giver.

Testaments.

THE principal gift of this kind was by testament; and this did not take place till after the death of the giver [z]. The whole law of testaments stated by Glanville, is delivered by Bracton as law, and sometimes in the very words of that author; it will therefore be unnecessary to do more than notice such parts as are more explicitly treated by Bracton, together with such additions as he has made to Glanville's account [a]. He says, that, generally, a wife could not make a will without the consent of her husband; yet that it had been usual (as was intimated by Glanville [b]) for the wife to make a will of the *rationabilis pars* which would come to her if she survived her husband, and particularly of such things as were given her for the dress and ornament of her person, as her clothes and jewels, all which might most properly be called her own.

GLANVILLE says, that the administration of intestates' effects belonged to the nearest of kin; but Bracton says, that in such case, *ad ecclesiam et ad amicos pertinebit executio bonorum*. The law upon the subject of testaments is thus laid down by our author. The expences of the funeral were to be allowed out of the effects, and the widow was entitled to receive all necessaries thereout till her quarantine was expired, unless her dower was assigned before. If the deceased left no moveables, the heir was to be burthened with all the debts [c], as far as the inheri-

[z] Bract. 60. [a] Vid. ant. 80. [b] Vid. ant. 111. [c] Bract. 60. b.

tance went, and no further. There were particular cuſtoms which directed a diſpoſition of the effects ſomewhat differing from the general law: this was in ſome cities, boroughs, and towns. Among theſe, the city of London had a cuſtom, that when a certain dower was appointed, whether in money or other chattels, or in houſes, which were conſidered as chattels, the widow could demand nothing, beyond that, out of the effects, unleſs by the ſpecial favour of the huſband, who might leave her more: and again, the children could not demand, by pretence of any cuſtom, more than was left them by the teſtator, if he made a will. Bracton ſays, that a man could not make a will of a right of action, nor of debts not judicially aſcertained, but that actions for ſuch things belonged to the heir; yet, when theſe were once reduced into judgments, they became part of the *bona teſtatoris*, and belonged to the executors, under the direction of the eccleſiaſtical court [d].

Eccleſiaſtical juriſdiction therein.

WHATEVER doubt there might have been whether the eccleſiaſtical court entertained ſuits for the recovery of legacies in the time of king John [e], it is beyond a queſtion, that in the beginning of Henry III. that branch of juriſdiction was firmly ſettled [f]. It is probable, that legacies were a ſubject *mixti fori*, in the ſame manner as tythes long were, before they became entirely confined to the ſpiritual court; but it appears that the temporal courts in this king's reign ſo far gave up their claim, as not to prohibit the eccleſiaſtical judges. This article of juriſdiction might be thought not a very unlikely conſequence to follow from the power of granting *probates*; but it is conjectured by a canoniſt of great authority [g], that it took its riſe out of thoſe laws in the code which made the biſhop protector over legacies given *in pios uſus*. It is conſiſtent enough with the uſual practice of churchmen in particular, and conformable with the inclination of courts (*ampliare*

[d] Brac. 61. [e] Vid. ant. 72. [f] 2 Hen. III. Tit. Pro. 13. [g] Lindewoode.

*juriſdictionem*),

*jurisdictionem)*, to suppose that the ecclesiastical court might have gradually gained jurisdiction over all personal legacies, under colour of such as were given *in pios usus* [h]. This might have been the first step towards it; but it is most probable, that there was a direct authority for this innovation derived from the canon law. For although the *Decretals*, where it is set forth as a general law, were not published by Gregory IX. till the 24th year of Henry III. the canon which warrants this point of judicature was much more ancient, and, without doubt, had travelled hither long before the collection of Gregory was made; and the authoritative promulgation by that pope, might give new sanction to an usage which had obtained some time before.

The granting administration of intestates' effects by the ordinary, though established on a more solid foundation, the express law of this country, by the charter of king John, and confirmed by that of Henry III.[i] did not prevail universally. It seems that lords in some places, in maintenance of their former right, still exercised some jurisdiction in the disposition of intestates' goods, in opposition to the authority of the bishops. The power hereby intrusted to the bishops was abused in a very shameful manner; for instead of taking order for a due distribution of such goods, when they had once got possession of them, they committed the administration of them to their own use, or the use of their churches, and so defrauded those, to whom, by right of succession, they belonged; and this they did with the pretence of law and conscience on their side, affecting that this disposition of them *in pios usus* very fully satisfied the requisition of law. This practice grew to such a height, as to occasion a constitution in this king's reign, enjoining that they should not dispose of them otherwise than

[h] 3 Seld. 1675.

[i] This clause, as before observed, was left out of the *Inspeximus*, 25 Ed. I. and so is not in the common printed charters.

according

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according to the Great Charter, that is, to the next of kin; notwithſtanding which, the practice ſtill continued, and the right of ſucceſſion was, by degrees, in a manner altered. It was even ſtated by the canons, as the law of the land [k], that a third part of inteſtates' effects ſhould be diſtributed for the benefit of the church and the poor [l]; which was in effect the whole that properly belonged to the inteſtate, after the *partes rationabiles* of the wife and children. Theſe abuſes of eccleſiaſtical judges gave occaſion to two ſtatutes, made in the reign of Edward I. and Edward III.

Of deſcent.

THE laſt mode of acquiring property was *by ſucceſſion*. The law of deſcent in the time of Glanville continued, with ſome ſmall variation. We have ſeen that in Glanville's time the eldeſt ſon was the ſole heir, in knight's ſervice, and in moſt inſtances in ſoccage [m]; but it was now laid down by Bracton, generally, that, in both caſes, *jus deſcendit ad primogenitum* [n]. It was alſo now held, that all deſcendants *in infinitum* from any perſon who would have been heir, if living, were to inherit *jure repræſentationis*. Thus the eldeſt ſon dying in the life-time of his father, and leaving iſſue, *that* iſſue was to be preferred, in inheriting to the grandfather, before any younger brother of the father; which ſettled the doubt that had occaſioned ſo much debate in the time of Henry II.[o]

THE rule of deſcent was, that the neareſt heir ſhould ſucceed; *propinquior excludit propinquum, propinquus remotum, remotus remotiorem.* Sometimes the right of blood conſtituted a particular ſort of propinquity, to the prejudice of the male heir, who, in other inſtances, is ſo much favoured in our law; as in the following caſe: A man had a ſon and daughter by one wife, and after her death married another, and had a ſon and daughter by her; the ſon

[k] Decretal. lib. 5. t. 3. c. 42.
[l] 3 Seld. 1681.
[m] Vid. ant. 78.
[n] Bract. 64. b.
[o] Vid. ant. 79.

of

of the second marriage made a *purchase* of land, and died without children: in this case, says Bracton, the sister by the second wife would take, in exclusion of the other brother and sister. Some were of opinion, that this piece of law was entirely confined to cases of purchased lands, but that it was otherwise in cases of inheritance; for there respect was always to be had to the common ancestor from whom the inheritance descended; and the right should never come to a woman so long as there was a male, or one descended from a male, whether from the same father and mother, or not [p]. Bracton, however, seems to think, that this rule of descent was to be observed in *inheritances*, as well as in purchased lands; because every one, as he came into seisin, made a *stipes* and a first degree [q]: and so it was settled in the next reign, when this opinion of Bracton was adopted in the maxim, *seisina facit stipitem*. The impediment thrown in the way of descent by the rule, *nemo potest esse hæres et dominus*, still continued, though it was avoided by many devices; the most common of which was that of infeoffing to hold of the chief lord, and not of the feoffor; for this avoided the necessity of doing homage to the elder brother [r].

*De partu suppositio.*

The law had provided a preventive against imposing suppositious children, to exclude those who were next intitled to the inheritance. If a woman, either in the life of her husband, or after his death, had pretended to be pregnant when it was thought she was not, in order to disinherit the heir; the heir might have a writ commanding the sheriff to cause the woman to come before him, and before the guardians of the pleas of the crown, or before such person as the king should authorise to judge therein, and cause her to be inspected by lawful and discreet women, in order to inquire of the truth [s]; and she was put in a sort of free custody during her pregnancy, that the

[p] Bract. 65. [q] Ibid. 65. b. [r] Ibid. 68. a. b. [s] Ibid. 69, 70. a. b.

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impoſture, if any, might not eſcape detection. This was the way in which a woman was dealt with, when ſhe falſely pretended to be pregnant. If the huſband and wife agreed together in educating a ſuppoſititious child as their own, the right heir might have a writ *quòd habeas corpora* of the huſband and wife before the juſtices, where the truth would be examined. Another perſon who had a temptation to play this trick upon the next heir, was the chief lord, who, when he had an heir in ward, and it died, would ſometimes ſet up another, in order to continue the cuſtody of the land; in which caſe, there was a writ and proceeding ſimilar to the former [t].

Of Partition.

When an inheritance deſcended to more than one heir, and they could come to no agreement among themſelves concerning the diviſion of it, a proceeding might be inſtituted to compel a *partition*. A writ was for this purpoſe directed to four or five perſons, who were appointed juſtices for the occaſion, and were to *extend* and appreciate the land by the oaths of good and lawful perſons choſen by the parties, who were called *extenſores*; and this extent was to be returned under their ſeals, before the king or his juſtices: when partition was made in the king's court, in purſuance of ſuch extent, there iſſued a *ſeiſinam habere facias*, for each of the *parceners* to have poſſeſſion [u].

Dower.

It remains only to ſay a few words on the claim of dower, and then we ſhall have finiſhed this part of our ſubject, namely, the title of private rights. Dower is defined by Bracton, not in the words, but upon the ideas of Glanville [x]. Dower, ſays he, muſt be *the third part of all the lands and tenements which a man had in his demeſne, and in fee, of which he could endow his wife on the day of the eſpouſals* [y]: ſo that, according to Bracton, the claim of dower was ſtill limited to the freehold of which the huſband

[t] Bract. 70. b. 71.
[u] Ibid. 71. b. to 77. b.
[x] Vide ant. 72.
[y] Bract. 92.

was

was ſeiſed at the time of the eſpouſals, notwithſtanding the proviſion of *Magna Charta*, which ſeemed to extend it to all the land that belonged to the huſband during the coverture [z]. The regular aſſignment of dower had been ſecured to widows by the chapter of *Magna Charta* juſt alluded to, and it was rendered more effectual, by a proviſion in the ſtatute of Merton *. More will be ſaid of dower when we come to the remedies which the law had furniſhed for recovery of it.

THUS far concerning the law of private rights, as it ſtood in the time of Henry III.

[z] Vid. ant. 242. * Vid. ant. 262.

CHAP.

# CHAP. VI.

## HENRY III.

*Of Actions—Of Courts—Writs—Of Diſſeiſin—Aſſiſe of Novel Diſſeiſin—Form of the Writ—Proceeding thereon—Of the Verdict—Exceptions to the Aſſiſe—Aſſiſa vertitur in Juratam—Quare ejecit infra Terminum—Aſſiſe of Common—Of Nuiſance—Aſſiſa Ultimæ Præſentationis—Exceptions thereto—Of Quare Impedit—Quare non Permittat—Aſſiſa Mortis Anteceſſoris—Vouching of Warrantor—Where this Writ would lie—Writ de Conſanguinitate—Quòd Permittat—Aſſiſa Utrum—Of Convictions—and Certificates—Of different Trials—Dower unde Nihil—Writ of Right of Dower—Of Waſte—Of Writs of Entry—Different Kinds thereof.*

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THE whole courſe of judicial proceeding, ſince the time of Glanville, had become a buſineſs of much learning and refinement; the writ, the proceſs, the pleading, the trial, every part of an action was treated as a ſubject of intricate diſcuſſion. While theſe changes were made in the old remedies, new ones were invented, as more peculiarly adapted to certain caſes than thoſe before in uſe. Of all theſe we ſhall treat in their order.

Of actions.

ACTIONS are divided by Bracton into ſuch as were *in rem*, or *in perſonam*, or *mixt*; that is, *real*, *perſonal*, or *mixt* [a]. Perſonal actions were for redreſs in matters *ex contractu*, and *ex maleficio*, as the Civilians termed it; and alſo in ſuch as they called *quaſi ex contractu*, and *quaſi ex maleficio*. It follows, that of perſonal actions ariſing *ex*

[a] Bract. 101. b.

*maleficio*,

*maleficio*, some were *civil*, and some *criminal*. Real actions are for the recovery of some certain thing; as a farm, or land: they were always brought against the person then in possession of the thing, and were for the recovery of it *in specie*, and not for an equivalent in damages [b]. When an action was brought for any moveable, some thought that it should be considered as a real action, as well as personal, because the person possessed of it was to make restitution of the thing in question; but, says Bracton, this was, in truth, only personal; for the defendant was not obliged specifically to restore the thing demanded, but was only bound to the alternative of restoring the thing, or its price; and therefore, in such an action, the price of the thing ought always to be defined. A mixed action was so called, because it was *tam in personam, quàm in rem*, having a mixt cause on which it was founded; as the proceeding *de partitione* among parceners, and *de proparte sororum*; that for settling of bounds between neighbours and baronies *per rationabiles divisas*, or *per perambulationes*; in which each party seems to have been plaintiff and defendant, though he alone was properly plaintiff who commenced the suit.

Real actions were divided into such as were to recover *possession*, and such as were to recover the *property*; a distinction which will be very strictly observed in all we have to say on these actions, and was rigidly adhered to in applying them; it being a rule, that though a person who had failed in any proceeding for the possession, might resort to the next superior remedy, yet he could never descend. He might have an assise of novel disseisin; and if he failed in that, he might have a writ of entry (a new writ, of which we shall soon say more), and lastly a writ of right; but having begun with a writ of right, he could not avail himself of the other remedies [c].

[b] Bract. 102. [c] Ibid. 104.

Some

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SOME actions were permitted by law to be brought at any diſtance of time; but, in general, actions were *limited* to be brought within a certain period, on account of the defect of proof which would happen in a courſe of years [d]. Suits which were to recover ſuch things as belonged to the king's crown, might be brought at any diſtance of time; on which privilege of the king was founded this rule, that *nullum tempus currit contra regem*, or *nullum tempus occurrit regi*: and it ſhould ſeem from Bracton's manner of expreſſing himſelf, that, inaſmuch as the ſuits of private parties were limited, becauſe, beyond a certain period, they could hardly be able to bring proofs; the king, in concurrence with the privilege of inſtituting his ſuits without any limitation of time, ſhould, in queſtions of antiquity, be intitled to throw the *onus probandi* on the defendant; and on his failing, ſhould recover without bringing any proof at all [e].

Of courts.

BEFORE we enter upon the proceeding and conduct of actions then in uſe, it may be convenient to premiſe a ſhort view of the courts in which civil and criminal juſtice was adminiſtered: and firſt of criminal ſuits. Criminal ſuits, where a corporal pain was to be inflicted, uſed to be determined *in curiâ domini regis*, in the king's court; which general expreſſion is explained in Bracton by ſaying, that if the offence concerned the king's perſon, as the crime of leſe majeſty, it was determined *coram ipſo rege*, by which was meant the great ſuperior court, of which ſo much has been already ſaid: if it concerned a private perſon, it was *coram juſtitiariis ad hoc ſpecialiter aſſignatis*; that is, we may ſuppoſe, either the juſtices in eyre or of gaol delivery. Theſe were all equally the king's courts; and as the lives and limbs of his ſubjects were in the king's hands, either for protection or puniſhment, it was proper they ſhould be ſubject to his deciſion only, unleſs in the

[d] Bract. 102. b. [e] Ibid. 103.

few

few instances where persons enjoyed the franchise of holding a criminal court; as the franchises of *Toll* and *Tem*, of *Infangthef* and *Outfangthef*[f].

The courts for the determination of civil suits were as follow: Real actions might be commenced in the lord's court of whom the demandant claimed to hold his land; from whence they might be transferred, upon failure of justice, to the sheriff's court, and from thence to the superior one[g]; but if such a suit was not removed for some cause or other, it might be determined in the court baron. In the county court were held pleas upon writs of *justicies*, as *de servitiis et consuetudinibus*, of debt, and an infinitude of other causes; among which were, suits *de vetito namio*, and pleas *de nativis*, unless it became an issue, whether free or not, and then the enquiry stood over till the coming of the king's justices; the question of a man's liberty being thought of too high consideration to be intrusted to an inferior jurisdiction.

Such civil actions, whether personal or real, which were determinable in the king's court, were heard before justices of different kinds. The different courts which were called the king's are thus described by Bracton: *Curiarum habet unam propriam, sicut aulam regiam, et justitiarios capitales, qui proprias causas regis terminant, et aliorum omnium, per querelam, vel per privilegium sive libertatem;* the latter part of which description he explains by instancing one who had a grant not to be impleaded any where but *coram ipso domino rege;* though it might be doubted whether *per querelam* is thereby explained, and whether that expression does not mean a distinct method of proceeding by *complaint*, similar to what we see at this day in the modern king's bench, and of which we shall have occasion to say more hereafter. Thus far of the *aula regis*. Our author proceeds, and says, *habet etiam curiam, et*

[f] Bract. 104. b. [g] *Ad magnam curiam.* Bract. 105.

*justitiarios*

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*juſtitiarios in banco reſidentes, qui cognoſcunt de omnibus placitis, de quibus authoritatem habent cognoſcendi; et ſine warranto juriſdictionem non habent, nec coercionem*; in which he ſeems to deſcribe *the bench* as having no authority but by the writs returnable there. He goes on to mention the juſtices itinerant through the counties; ſometimes *ad omnia placita;* ſometimes *ad quædam ſpecialia;* as to take aſſiſes of novel diſſeiſin, of mortauncestor, and *ad gaolas deliberandas*, to deliver one or more particular gaols. As cauſes were ſometimes removed from the court baron to the county, ſo, as appears from Bracton, and as was hinted above, were they removed before the juſtices itinerant, and from thence into the bench, or *coram rege* [h]. Theſe are all the courts ſpoken of by Bracton; and therefore it muſt be concluded, that the court of exchequer was ſtill conſidered as identically the ſame with the *aula regis;* and that the *proprias cauſas regis* particularly meant the government of the revenue; which is perfectly conſiſtent with the account before given [i] of this great court in its firſt origin, and before the bench had any exiſtence.

BESIDES this expreſs account of courts, there are ſcattered up and down Bracton's work ſeveral paſſages which give us intimation of the nature of theſe courts; the principal of which are the returns of writs. A compariſon of ſuch expreſſions, as they occur in the courſe of this chapter, will throw a new light on the judicature of the time.

Writs.

THE ſubject of writs ſeems to have been ſtudied with great diligence; writs had been deviſed for a greater variety of occaſions than in Glanville's time, and they were diſcuſſed with more preciſion and ſyſtem. Bracton divides writs into different kinds, in this way. He ſays, there were ſome which were *formata ſuper certis caſibus*, DE CURSU, *et de communi conſilio totius regni conceſſa et appro-*

[h] Bract. 105. b.

[i] Vid. ant. 48, 49, &c.

*bata*;

*bata;* and these could not be changed without the consent of the same power that framed them. There were others which he calls *magistralia*, and which were varied according to the variety of cases and complaints. These *magistralia brevia*, it should seem, from Bracton's account of them, were distinguished from, and put in contrast with, the *brevia formata*, as being changeable without the permission of the legislature[k]. Those which gave *origin* and commencement to a suit[l] were called *brevia originalia*, and were called, some of them *aperta*, or *patentia*, and some *clausa;* such as arose out of these were called *judicialia:* these were varied according to the pleadings between the parties, and the particular purpose which they were to answer.

In discoursing on the nature of civil actions, we shall begin with those that were called *real*. In order to understand the design of the various real remedies which the law furnished, it will be necessary to attend to the manner in which they considered the occupation of land and its appurtenances, under the circumstances of a more or less complete enjoyment.

Of land, a man might have either what they called *possession*, or what they called *jus*, or *proprietas*. Possession was of various sorts, and divided by very nice distinctions. One was said to be *quædam nuda pedum positio*, which they called *intrusion*; and this contained in it, says Bracton, *minimum possessionis*, and *nihil juris*, being somewhat of the nature of a disseisin: in both it was a *nuda possessio*, till it received a *vestimentum* by length of time. Another was a precarious and clandestine possession, attended with violence, which acquired no *vestimentum* by length of time; and this, says the same authority, had *parum possessionis*, and *nihil juris*. A possession for term of years, as it gave nothing but the usufruct, was considered in a de-

[k] Bract. 413. b. [l] Ibid. 414. b.

gree

gree higher, as having *aliquid poſſeſſionis*, but *nihil juris*. The next was for life, as dower, or the like; and this being a ſtep higher, was ſaid to be *multum poſſeſſionis*, but ſtill *nihil juris*. The next degree was, where a perſon had the freehold and fee to him and his heirs; and then he was ſaid to have *plus poſſeſſionis, et multum juris:* and he who had the freehold, fee, and property, united in himſelf, had *plurimum poſſeſſionis*, and *plurimum juris*, which was called *droit droit*, and contained the higheſt degree of property and poſſeſſion; except that, even then, ſome other perſon might have *jus majus*, or greater right[m].

We ſhall ſpeak of the remedies applicable to theſe ſeveral kinds of poſſeſſion in the order ſuggeſted by the above diſtinctions, beginning with the writ of *intruſion*. Intruſion was, when a perſon, not having the leaſt ſpark of right, came into a vacant poſſeſſion; as, after the death of the anceſtor, before the heir or the lord entered. The perſon entitled to the reverſion, in ſuch caſe, might have a writ, which had been invented ſince the time of Glanville, and reſulted from ſome of the artificial notions which we have juſt ſtated, concerning poſſeſſion. The form of this writ varied according to the circumſtances under which the perſon bringing it claimed; whether he was the lord or the heir; whether he claimed upon the death of an anceſtor, of a tenant in dower, or *per legem Angliæ*, or for life. The following was a more general form of it: *Rex vicecomiti ſalutem. Pone per vadium et ſalvos plegios A. quòd ſit coram, &c. ad reſpondendum*, or *oſtenſurus quare intruſit ſe in terram, &c. quam B. qui nuper obiit, tenuit de eodem C. ad vitam ſuam tantùm, et quæ, poſt mortem ejuſdem B. ad eundem C. reverti debuit, ut idem C. dicit: et habeas, &c.*

Possession created a ſort of right; it was adviſeable therefore for the heir to eject the intrudor within a year, or at the end of that time have recourſe to this writ; for it is laid down by Bracton, that no one could be put

[m] Bract. 159. b. 160.

to

to anſwer for an intruſion of longer ſtanding. Reſpecting this time of limitation, Bracton ſeems not very preciſe; for he afterwards ſays, at fartheſt, not at the diſtance of ten or twelve years, as was determined in this reign[n]; but the claimant was then driven to his writ of entry, grounded upon the intruſion[o]; a writ lately invented, of which more will be ſaid in its proper place.

Of diſſeiſin.

THE next thing to be conſidered is, that wrongful poſſeſſion which was obtained by diſſeiſin, and the method of redreſs the law directed to be purſued. Diſſeiſin was now conſidered in a very large ſenſe, and much beyond the idea to which it was firſt applied. It was not only when the owner, or his agent, or family, who were in ſeiſin in his name, were ejected from the freehold unjuſtly and violently, without judgment of law; but alſo, when a houſe had been left without any one therein, and the owner, his agent, or family, returning from his buſineſs, was denied admittance by one who had taken poſſeſſion, it was a diſſeiſin; if a man was obſtructed in a free uſe of his freehold, that was a diſſeiſin; for though he might remain in poſſeſſion, the full extent of that poſſeſſion was not enjoyed. If any one dug, or put ſheep, or otherwiſe intruded upon, land, under claim of an eaſement (for if it was without a claim of right it was only a treſpaſs); or, if a perſon made improper uſe of an eaſement he had a right to; this was a diſſeiſin. Again, if a perſon was in ſeiſin for life, or for years, or as guardian, or otherwiſe, and infeoffed another, in prejudice of the right owner; if a perſon diſtrained for ſervices not due, or where they were due, exceeded the bounds of a reaſonable diſtreſs; theſe were diſſeiſins. In ſhort, if one claimed to partake with the right owner, or raiſed an unjuſt contention againſt him, it was a diſſeiſin of the freehold[p].

THE above were diſſeiſins without violence; others were ſaid to be violent; but, in order to underſtand what the

[n] 16 Hen. III. [o] Bract. 160, 161. a. [p] Ibid. 161. b. 162.

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law considered as a violent disseisin, we must see what the nature of *vis* was. *Vis* was of two kinds, according to Bracton: thus, there was *vis simplex* and *vis armata*. It is not difficult to conceive what was said to be *vis armata*: it was not only the coming with weapons of any sort, or finding them at the place where they were used; but if a person came with arms, and made no use of them, the terror of them might be thought so to have operated, as to make the disseisin seem to have been *cum armis*. *Vis simplex* is defined by Bracton to be *quotiens quis, quod sibi videri putat, non per judicem reposcit*; that is, wherever a person took the law into his own hands. This distinction of *vis cum armis* and *vis sine armis*, was important, as the penalty upon disseisors was proportioned thereto[q].

Whatever was the way in which the disseisin was committed, the law not only allowed but required the disseisee, *incontinenter, flagrante dissesinâ et maleficio*, to expel the wrong-doer. What was meant by *incontinenter*, Bracton thinks was pointed out by the term of fifteen days allowed to a tenant summoned in a writ of right. If the owner was present at the time of the disseisin, he was to eject the disseisor that very day, if possible, or on the morrow, or the third or fourth day; and beyond that time, provided he had uninterruptedly continued his endeavours, by calling in the assistance of his friends, and resuming the attack.

If he was absent when the disseisin was committed, then a distinction was to be made according to the distance; a reasonable time was allowed for his getting information of the fact, and for his arrival; and if he pursued his attack upon the disseisor within the stated time after such arrival, the law considered it as done *incontinenter*. As for instance, if he was out of the kingdom in, what was called, *simplex peregrinatio* to St. Jago, or in the king's service

[q] Bract. 162.

in

in Gascony, he had forty days, and two floods and one ebb; which latter indulgence was for the delay occasioned by the sea: and then he had the fifteen days after he returned, and also the four days above-mentioned, to resume the attack. If he was in a *simplex peregrinatio* to the Holy Land, he had a year allowed him, together with the fifteen and four days; but if he was in what they called a *general passage* to the Holy Land, the time was three years, together with the fifteen and four days.

SUCH was the time allowed by the law, for a man to redress the injury he had suffered; but if he permitted a longer period than that to elapse, he gave up this right, and lost both his natural and civil possession, as they called it, which were thenceforward in the disseisee, who could not afterwards be ejected but by judgment of law[r].

As to the power of redress by the act of the party injured, and the situation in which recourse must be had to the assise, the law may be shortly stated in this manner. For instance, I eject you from your freehold; you may have an assise. Again, I eject you, and you me, incontinently, *flagrante disseisinâ*; I cannot have an assise, because I only suffer what I had before done myself. Again, I eject you, and you eject me, incontinently, and I, again, incontinently eject you; still you may have an assise, and so *in infinitum*; for the true possessor may, by law, eject, incontinently, the wrong doer, and an assise shall not be brought against him for it: but should the true possessor be negligent, after the disseisin, in pursuing the injury, he lost, as was before said, both his civil and natural possession, and had no redress but by the assise[s].

IF the disseisor transferred the land on the day of the disseisin, or the day after, the donee might be ejected, incontinently, by the true owner, the same as the principal disseisor: in like manner also, the assise might be brought

[r] Bract. 163. [s] Ibid. 164.

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againſt both; againſt the firſt *ad pœnam*, and againſt the ſecond *ad pœnam* and *ad reſtitutionem*. If a long interval had paſſed between the diſſeiſin and the transfer, the ſecond would not have been liable *ad pœnam*, but only to make reſtitution [t]. Again, if the firſt wrong-doer was diſſeiſed by another, the true owner might either incontinently eject the laſt diſſeiſor, or bring an aſſiſe againſt him; and if he deferred doing it, the firſt diſſeiſor might do either. In all theſe caſes of recovering poſſeſſion by force, the ſheriff, though not bound to interfere *ex officio*, might aſſiſt at the requeſt of the diſſeiſee; yet he was to take care how he acted, as he would be ſubject to an aſſiſe, in like manner as the perſon whom he meant to aſſiſt: he might take a part in theſe matters, either as a private friend, or officially as ſheriff, to keep the king's peace [u].

Aſſiſe of novel diſſeiſin.

WHEN the party diſſeiſed had neglected to avail himſelf of the authority the law gave him to recover poſſeſſion while the injury was freſh, he was then to recur to the recognition of aſſiſe; that compendious way for recovering poſſeſſion, which became now more practiſed than ever.

EVERY body who was tenant of a freehold *nomine ſuo proprio*, might have this remedy by aſſiſe; thoſe therefore who were in poſſeſſion *nomine alieno*, as a guardian, an agent, the family of a man, or his ſervant; a *firmarius*, or fructuary (not being a *fœdi firmarius*); an uſurer, or gueſt; one who held from day to day, or from year to year; or an uſufructuary who held for a term of years; none of theſe could bring an aſſiſe; but that remedy was left to him who was the *dominus proprietatis*, out of whoſe fee all thoſe intereſts iſſued. It is laid down gravely by Bracton, that ſhould a man be ejected from his ſhip, *quaſi de libero tenemento*, he was no more entitled to an aſſiſe than if he had been dragged from his horſe or carriage; though he makes a queſtion concerning an ejectment from a wooden

[t] Bract. 164. [u] Ibid.

houſe:

houſe: to which he anſwers, that if it ſtood on his own land, whether adhering to the ſoil or not, an aſſiſe would lie; but if on the land of another, and there had been any prohibition or injunction againſt the building, or removal, the perſon on whoſe land it was built might have an aſſiſe; if there had been none, and it had been removed without any conteſt, he could not have an aſſiſe [x].

An aſſiſe lay not only againſt the diſſeiſor, but againſt all his aiders and abettors, whether preſent or not; not only againſt thoſe who did the fact, but againſt thoſe in whoſe name it was done; or who, after it was done, concurred in or approved it; as by this avowal and ratification, they ſeemed to make themſelves parties [y]. It only lay againſt thoſe, who were in ſome of the above ways parties to the fact; and therefore not againſt an heir, or ſucceſſor to the diſſeiſor; who, though liable to make reſtitution, were not to undergo a penalty for the diſſeiſin [z]. Nevertheleſs, where any of the parties died, or the aſſiſe had not been brought with ſuch diligence as the law required, and the matter was not, by commencement of ſome proceeding, become *litigious*, as the lawyers called it; in ſuch caſes recourſe was to be had, not to a writ of right as formerly, but to a remedy which had been lately invented, called a writ *de ingreſſu*, or writ of entry; which has been ſo often alluded to, and of which more will be ſaid hereafter [a].

Form of the writ.

The form of the writ of novel diſſeiſin differed from that in Glanville's time in nothing but in the return: the limitation was ſtill, notwithſtanding the ſtatute, *poſt ultimum reditum domini regis de Britanniâ in Angliam* *; but the return was *uſq; ad primam aſſiſam cùm juſtitiarii noſtri ad partes illas venerint*; according to the appointment of juſtices of aſſiſe, as directed to be made by *Magna Charta*. It ſeems, that upon this writ pledges of proſecution were to be taken by the ſheriff only in caſe they had not been found in the

[x] Bract. 167. 168.
[y] Ibid. 171.
[z] Ibid. 172.
[a] Ibid. 175, 176.
* Vid. ant. 264.

King's

king's court, or a promiſe given, which uſed in ſome inſtances to be accepted inſtead of pledges. The pledges were to be two at leaſt, and ſuch as were ſufficient to pay the *miſericordia* to the king, if the complainant ſhould retract, or not proſecute his ſuit. If a huſband and wife were complainants, two pledges were enough; and it was the practice to be contented with two, when there were more complainants than one; though it was thought ſafer that each ſhould find two. Notwithſtanding the clauſe commanding the ſheriff *quòd faciat tenementum reſeiſiri de catallis*, was ſtill continued, this part of the writ, ſays Bracton, was never executed; but theſe were left to be eſtimated in the damages by the recognitors [b].

THE other directions of the writ were to be executed as follow: in purſuance of *quòd tenementum faciat eſſe in pace*, &c. the ſheriff was to ſee that the diſſeiſor did not convey the land to any one, and that the diſſeiſee made no entry thereon; and if an entry was made by any one, under any pretence whatever, he was to reſtore it to the true owner, ſo to remain till the next aſſiſe. As to ſending the recognitors *ad vivendum tenementum*, he was to cauſe a view to be had, not by one or two, but by the whole, if poſſible, or, at leaſt, by ſeven; for an aſſiſe could not, ſays Bracton, be taken by leſs than ſeven, though it might, for particular reaſons, be taken by more than twelve.

THE reaſon of a view was, that there might be a certainty about the matter in queſtion, both for the guide of the jurors in ſwearing, and the judge in giving judgment. The jurors were to ſee what the freehold was; whether it was land or rent; whether it was conſecrated to the church or not; whether it was held ſolely, or in common. They were to ſee that the complainant did not put more in view than he had claimed in his writ, for then he would be amerced; though he might, if he pleaſed, put leſs. They

[b] Brac. 179.

were

were to ſee in what vill, in what *locus*, in what part of the *locus*, and within what bounds, the freehold lay. If it was a rent, they were to ſee the land out of which it iſſued (an aſſiſe being the remedy for rents, in ſome caſes where a diſtreſs failed): the like of common of paſture. They were to view not only the land where the common lay, but alſo that to which it was appurtenant [c]; and thus, in all caſes, the jurors were to have a view of the thing in queſtion, for their better information [d].

It was the complainant's duty to attend and point out all the above circumſtances to the jurors; and if he could not, and appeared totally ignorant of the matter, the writ of aſſiſe was loſt, and the aſſiſe *cadit in perambulationem*, as they called it; that is, became, by conſent of the parties, a perambulation to make a general enquiry concerning the locality, the metes and bounds of the land [e]. It was a rule, that could the complainant point out the *locus*, but not the preciſe part thereof, it was ſufficient if he was proved by the oaths of the recognitors to have ſeiſin any where in the *locus* alledged.

Proceeding thereon.

If either of the parties failed to appear at the day appointed before the juſtices, his pledges were *in miſericordiâ*; if neither of them appeared, the aſſiſe was void, and all, both principals and pledges, were *in miſericordiâ*. If the diſſeiſor appeared and confeſſed the diſſeiſin, as in ſo doing he acknowledged an injury which was againſt the peace, he was to be commited to gaol. If the diſſeiſor was abſent, and the complainant preſent, together with the recognitors, though no one was preſent for the diſſeiſor, the aſſiſe was ſtill to proceed *per defaltam*; it being a rule, that the aſſiſe ſhould on no account be delayed: in ſuch caſe, however, the complainant was always examined as to the ground of his demand [f]. The complainant might, at the time of appearance, make a *retraxit* of his complaint; for

[c] Brac. 180. [d] Ibid. [e] Ibid. [f] Ibid. 182. 183.

which

which his pledges, as was before ſaid, would be amerced, unleſs he obtained the licence of the court for ſo doing [g].

When both parties appeared in court, the writ was to be read, and the matter of complaint enquired into. Bracton blames ſome judges, who immediately, after hearing the writ read, would proceed to aſk the party complained of, what he could ſay againſt the aſſiſe: he thought it haſty and premature to put a perſon to anſwer, before the matter of the complaint was properly examined and eſtabliſhed; for it was not yet known whether the proceeding was to be by an *aſſiſe* or by a *jury* (the diſtinction between which will be ſeen preſently), whether the fact was a *treſpaſs* or a *diſſeiſin*: he thought, therefore, that, as in a queſtion concerning the *proprietas*, the demandant was to ſhew by what right he claimed; in like manner, in this ſuit, it was not ſufficient barely to propound a complaint, but to ſhew the *jus querelæ*, and how the complainant was entitled to make it.

The juſtices, therefore, for their own information, and to inſtruct the jurors, were to interrogate as to the particulars of the complainant's caſe; of what freehold he was diſſeiſed, whether land or rent, whether for life or in fee, whether by deſcent or purchaſe; of a rent, whether it iſſued out of a chamber or a freehold, whether for life or in fee; of the boundaries and ſize of the freehold, whether there was any ejectment from the freehold, whether it was by day or night, with arms or without, with robbery or without; and innumerable other circumſtances which might conſtitute the merits of the caſe [h].

When theſe enquiries had been made, then, and not till then, was the tenant to be aſked, if he could ſay any thing why the aſſiſe ought to remain. The matter of ſuch objection might be found in the above interrogatories put to the complainant. If the tenant could ſhew no cauſe why

[g] Bract. 182. b. [h] Ibid. 184.

the

the aſſiſe ſhould remain, but at once denied he had committed any diſſeiſin; he ſimply put himſelf upon the aſſiſe, and the aſſiſe proceeded, as they called it, *in modum aſſiſæ*, that is, upon the ſimple queſtion of diſſeiſin; and if the jurors were preſent, or ſeven of them at leaſt, againſt whom there was no cauſe of exception, they proceeded to take the aſſiſe; if they were not preſent, the aſſiſe was deferred to another day, when they were to appear, and the aſſiſe was to proceed.

If the jurors appeared at the next day, then the exceptions to them were to be ſtated. Theſe were of various kinds. Bracton ſays, that was a good exception to a juror, which would be a good one to a witneſs. One rendered infamous by having been convicted of perjury, could not be a juror, according to the rule expreſſed in the Engliſh of thoſe days: "*He ne es othes worthe that es enes gylty of oth broken.*" Any enmity againſt a party, any friendſhip with him, was a good exception. Being a ſervant, familiarity, conſanguinity, affinity, unleſs the connexion was equally with both parties; being of the ſame table or family; under the power of a party, ſo as to be benefited or hurt: owing ſuit or ſervice; being counſel or advocate; all theſe, and many others, were good cauſes of exception to jurors. When the parties had at length agreed upon a juror, they could not afterwards reject him; and when the number was complete, the aſſiſe proceeded, the firſt juror having taken the following oath: "Hear this, ye juſtices, that I will ſpeak "the truth of this aſſiſe, and of the tenement of which I "have had a view by the king's writ" (altering theſe words where the ſubject was a rent, a common, and the like), "and in nothing will omit to ſpeak the truth. So help "me God, and theſe holy goſpels." After this, the other jurors, in order, repeated the following words: "That oath which the foreman here hath taken[1], I will

Of the verdict.

[1] *Talis primus hic.*

"keep

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" keep on my part, ſo help me God, and theſe holy goſ-
" pels [k]."

AFTER the oath was taken in the foregoing manner, the prothonotary, for the information of the jurors, was to rehearſe the effect of the writ, in the following way: " You " ſhall ſay, upon the oath which you have taken, whether " *N.* unjuſtly, and without a judgment, diſſeiſed *B.* of " his freehold in ſuch a vill, after the laſt return of the " king, &c. or not." In this ſituation of things the juſtices were to ſay nothing towards inſtructing the jurors, becauſe nothing had been ſaid by way of exception againſt the aſſiſe; but the jurors were to retire into ſome ſecret place, and there to converſe with one another upon what they had in charge; and no one was to have acceſs to them, or talk with them, till they had given their verdict; nor were they, on the other hand, by ſigns or words, to give the leaſt intimation what their verdict was to be.

THERE often happened a difference of opinion between the jurors; in which caſe the court uſed, as it was called, to *afforce* the aſſiſe; that is, others, according to the number of diſſenting voices, were added to the major part of the aſſiſe; and if they happened to agree, their verdict was held good; and the diſſenting jurors were to be amerced *quaſi pro tranſgreſſione*, ſays Bracton, as guilty of a ſort of offence, in obſtinately maintaining a difference of opinion.

WHEN the verdict was given, judgment was delivered according to it; unleſs the jurors ſhould have expreſſed themſelves obſcurely, and the juſtices were diſpoſed to examine further into the matter: and ſhould the jurors, or thoſe who were added by afforcement, ſtill be unable to declare plainly and fully what their meaning was, the method was either to get the parties to agree the matter, or the judgment was adjourned into the great court, where it was finally to be determined. Another way of putting a point of doubt and

[k] Bract. 184. b. 185.

obſcurity

obſcurity into a courſe of examination, was by *certificate*, the nature of which will be explained hereafter. When the aſſiſe failed to give a plain and intelligible verdict, it was the office of the juſtices to endeavour to elucidate it by interrogation and diſcuſſion. If the jurors were entirely ignorant of the matter, then, as in the former caſe, others were to be added who knew the truth; and if, after that, the truth could not be got at, they were to give their verdict upon the beſt of their belief, according to their conſciences[l]. Though it was commonly ſaid, that truth was the province of the juror, and juſtice and judgment that of the judge; it ſeems, ſays Bracton, that judgment belongs to the jurors, inaſmuch as they are to ſay upon their oath, whether one man diſſeiſed another. But yet, as the judge is to give a juſt judgment, it becomes him diligently to weigh and examine what is ſaid by the jurors, to ſee whether it contains any truth, that he may not himſelf be miſled by their miſtakes[m].

If judgment was given for the complainant, the land was to be reſtored, with all its produce, received and to be received, from the diſſeiſin to the time of the judgment; and, as the ſheriff was commanded to keep the land in peace till the aſſiſe was taken, the diſſeiſee was to recover damages for any unjuſt abuſe or miſuſe of the land in that interval. The diſſeiſor was to ſuffer certain penalties. He was to be *in miſericordiâ regis*, in proportion to the nature of the diſſeiſin; as, whether it was *cum armis* or without, ſo as the *miſericordia* was never leſs than the damages: beſides this, he ſuffered a penalty for the peace, if it had been violated. Again, if he had committed robbery with the diſſeiſin, he ſuffered a triple penalty; for the diſſeiſin, the *miſericordia*; for the peace, impriſonment; and for the robbery, as it is termed by Bracton, a heavy redemption: he did not, however, loſe life or limb, as the robbery was

[l] Brac. 185. b. 186. b.

[m] Ibid. 186. b.

not

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not profecuted criminally. The diſſeiſor, if he was the principal in the fact, was alſo to give to the ſheriff, on account of his diſſeiſin, an ox and five ſhillings; but thoſe who were only in aid, force, or counſel, did not, in general, pay this mulct to the ſheriff, though in ſome counties they did. The diſſeiſor was alſo to render damages, to be eſtimated by the oath of the jurors, and further, if need were, or the jurors had been exceſſive, to be taxed by the juſtices. But the juſtices were not to eſtimate the damages at a larger ſum than the jurors had, unleſs it was a very clear caſe, that the jurors had taxed them much lower than was reaſonable or proper [n].

THIS liberty of increaſing the damages was allowed to the judges, in order that diſſeiſins might never eſcape the proper puniſhment of the law; for, in thoſe times of diſorder and oppreſſion, there were many great men who would commit diſſeiſins for the mere purpoſe of making the moſt of the fruits and profits during the time they could keep their unlawful poſſeſſion: and when they had raiſed great ſums thereby, they could generally eſcape with a ſmall *miſericordia*, through the ill-placed lenity of jurors; who, when they, by their verdict, took from a diſſeiſor the land, were unwilling to load him beſides with heavy damages. For theſe reaſons, it was expected that the juſtices ſhould examine very carefully into the change that had been made on the land ſince the diſſeiſin, either through the wilfulneſs or neglect of the diſſeiſor, or any otherwiſe; all which he was to be compelled to make good, notwithſtanding much of the damage might have happened by death of cattle and other accidents, which it was out of his power to govern: nor was any allowance to be made to a wrong-doer for improvements [o].

Exceptions to the aſſiſe.

THIS was the manner of proceeding, when nothing was ſaid againſt the aſſiſe, nor any exception taken why it

[n] Bract. 186. b. 187. [o] Ibid. 187.

ought

ought *to remain*, as it was called; but if the tenant did not chuſe to put himſelf upon the aſſiſe, he might *except*, or plead ſuch matter as would cauſe it *to remain*, that is, defer it for the preſent, or perhaps entirely deſtroy it. Theſe exceptions were, to the writ, to the perſon of the complainant or tenant, and to the aſſiſe. Some exceptions to the writ deferred the aſſiſe, but did not deſtroy it: ſome exceptions to the perſon of the complainant entirely deſtroyed the aſſiſe: ſome exceptions were peremptory as to one perſon, and deferred the judgment, but were not peremptory as to another; as where the complainant was not entitled to the action, but ſome one elſe. The order of ſtating exceptions was this: if the writ was not good, there could be no further proceeding; but if that was good, then they reſorted to the perſon of the complainant, to ſee whether he was entitled to the complaint; then to the perſon of the tenant, to ſee if he was the perſon againſt whom the complaint ſhould be made; and laſt of all to the aſſiſe, to try *ſi tenens injuſtè et ſine judicio diſſeiſiverit ipſum querentem de libero tenemento ſuo* in ſuch a vill, after ſuch a period of time [p].

THUS, after the juriſdiction of the court was eſtabliſhed, the tenant was to take his exceptions to the writ. Exceptions to the writ were many; if there was any thing faulty therein; a ſpurious ſeal; a raſure in a ſuſpicious part, as where the names of the perſons, or places, or things, were written (for a raſure in the legal part was not ſo important as in theſe points of fact); if the date was at all changed; if the complainant had had a former writ of mortauncеſtor, of entry, or of right, and ſo had not obſerved the order of writs. Again, any error deſtroyed a writ, though it did not deſtroy the aſſiſe. It was error, if the writ was againſt one who was poſſeſſed *nomine alieno*, as a *firmarius*. The aſſiſe could not proceed if there was an error in the name, as *Henricus* for *Wilhelmus*; and ſo in the cognomen, as *Hubertus Roberti* for *Hubertus*

[p] Bract. 187. b.

*Walteri*;

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*Walteri*; ſo in the name of a vill whence a perſon took his deſcription, as London for Wincheſter: even if the error was in a ſyllable, as *Henry de Brocheton*, for *Henry de Bracton*; nay, even in a letter, as *de Bracthon*, for *de Bracton*: again, in a name of dignity, as *Henry de Bracton præcentor*, when he was *decanus*; ſo of a thing, as *vineam* for *eccleſiam*[q].

THEN followed exceptions to the perſon of the complainant; once of which was villenage, and its conſequences; excommunication; that he had not a freehold; that he ſhould diſtrain inſtead of bringing this writ; and many others. The tenant might next except to his own perſon; as for inſtance, that the action ſhould have been againſt his anceſtor or predeceſſor, and not againſt him[r]. And laſt of all, having gone through exceptions to the writ and to the perſon, he might except to the aſſiſe, upon the circumſtances of the caſe, by diſputing how far the operative words of the writ were juſtified in fact; how far he *injuſtè et ſine judicio—diſſeiſivit eum—de libero tenemento ſuo—in tali villâ*; every term of which charge was open to a variety of remarks and objections[s].

ALL theſe exceptions, whether they were peremptory or dilatory, were equally *out of the aſſiſe* (which was merely to try the diſſeiſin), and collateral to it; and therefore could not be determined by the recognitors of aſſiſe. We have ſeen, that in Glanville's time[t] ſuch incidental matters were in general tried by duel, there being very few iſſues which are ſaid by that author to have been uſually tried by recognition; of which one was, *infra ætatem vel non*; another was, whether ſeiſed *ut de vadio*, or *ut de fœdo*, and ſome others; as that of villenage, which was to be tried by the relations, and if they could not agree, by the vicinage; the gift of a fee, after a grant of the advowſon[u],

[q] Bract. 188, 189.
[r] Ibid. from 190 to 204.
[s] Ibid. from 204 to 212. b.
[t] Vid. ant. 146.
[u] Glanv. lib. 13. c. 20.

and

and others that may be ſeen in that reign; but, in general, points in debate that did not make the direct queſtion of ſeiſin, were tried by the duel. Since that time, the good ſenſe of mankind concurring with the ſtatute made by Henry II. concerning trials by recognitors, had ſo far prevailed over the habits of their anceſtors, that ſuitors uſed commonly, when a fact was in litigation between them in a cauſe, to conſent that *the truth thereof ſhould be enquired of by a* JURATA, or *jury*, in preference to a trial by duel; and they accordingly uſed to *pray* the court that it might be ſo; with which prayer courts had been ſo long uſed to comply, that a jury had become the regular mode of trying a fact in diſpute in a judicial proceeding. Thus there had gradually ariſen a new ſort of trial by recognitors or jurors, denominated a *jurata*; which was a tribunal choſen by conſent of the parties themſelves, and, on that account, differed ſomewhat in its conſtitution, deſign, and effect, from the *aſſiſa*.

To mention only one mark of their difference, and leave the reſt to be obſerved as occaſion preſents them: the *jurors* in a *jurata* were not liable to conviction for perjury, nor to the infamous judgment as the jurors in the *aſſiſa* were; the reaſon for which, according to Bracton, was, becauſe the *jurata* was a trial which the parties had themſelves prayed to have, and therefore they had no reaſon to complain of its determination; while the aſſiſe (to follow his idea) was a ſpecific remedy in a ſpecial caſe, to which and which only the parties were by the law confined for obtaining redreſs; and if the ends of juſtice were diſappointed by thoſe recognitors who were deſigned by the conſtitution to further it, they deſerved a very ſevere animadverſion. But, with ſubmiſſion, the reaſon of the conviction being allowed in one caſe, and not in the other, was not, it ſhould ſeem, owing to any particular difference in theſe two trials, as practiſed in the time of Henry III. but becauſe the Conſtitution of Henry II. had provided that

puniſhment

punishment for recognitors in the particular *assises* only, which were then invented. The devolving of questions upon recognitors to be tried by the consent of parties, was a practice that originated afterwards, and therefore was not within that provision: nothing can be a stronger mark of this trial not owing its existence to that famous law of Henry II. than the appellation of *jurata*.

THE difference between *assisa* and *jurata* was a very common piece of learning in this reign. This distinction was always observed, and was never more nicely attended to, than when it happened, as it sometimes did, for an *assisa* to be called upon to discharge the office of a *jurata*; and, instead of deciding the direct point in the action, to enquire of some collateral matter. For when any issue arose upon a fact in a writ of novel disseisin, mortauncestor, and the like actions, which fact the parties agreed should be enquired of by a *jurata*; nothing was more natural, nor indeed more commodious, than, instead of summoning other recognitors, as in Glanville's time [x], that the *assisa* summoned in that action should be the jurors to whom they might refer the enquiry. This was generally the case; and then the lawyers said, *cadit assisa, et vertitur in juratam*; the assise was turned into a jury, and the point in dispute was determined by the recognitors, not *in modum assisæ*, but *in modum juratæ*.

*Assisa vertitur in juratam.*

THUS, then, the exceptions mentioned above would in this reign, as they were out of the assise, be determined, not *in modum assisæ*, but *in modum juratæ*; as it were, says Bracton, by consent of the parties; where one alledged one thing, and the other the contrary, and each prayed that the truth of what he said might be enquired of. And in this case, says he, there is no conviction; for if the other party would controvert the saying of the jurors, the law gave him full liberty to say that the *proof*

[x] Glan. lib. 13. c. 20.

*was*

*was false*; the verdict of the jurors in this case being only a *proof of the exception;* every one being to prove the truth of his exception, and the person who replied to it being also bound to prove his replication, in which recourse was had to the jurors, merely for want of other proof.

This will be made clearer by giving an instance. Suppose the complainant stated his case by saying, that he married a wife having an inheritance, and after her death he was in seisin till such a one unjustly disseised him, and so was in seisin *per legem Angliæ*, for he and his wife had children between them. If the tenant did not, in answer to this, deny the disseisin, and put himself on the assise, to try whether he disseised him or not; he might deny some of the circumstances which the complainant had stated as making his title: he might except that they had no child; or if they had, that it died in the womb; or if it was born, that it was a monster, and not a child; or if it was a child and born alive, that it was not heard to cry between four walls: when the complainant to such a plea replied the contrary, the truth of the allegation was then to be enquired of by the assise *in modum juratæ*. In the former case, of the general issue *disseisivit vel non*, the jurors, if they swore falsely, would be liable to conviction; in the latter, they would not[y].

The instances in which an assise might be turned into a jury, were as numerous as the exceptions that might be taken to the complaint. We shall content ourselves with adding one more example to those already given; and this, being a very particular one, deserves our notice. An assise was sometimes turned into a jury *propter transgressionem*, on account of a trespass: as where a person made use of another's land against the owner's will; or where he used, as his own, the land of a person holding in

[y] Bract. 215. b. 216.

common with him; these might be disseisins and trespasses both; for every disseisin was a trespass, though not every trespass a disseisin. If then the entry upon the stranger's land was without any claim of right, it was not a disseisin, but a trespass. But as it was uncertain *quo animo* this was done; the complainant used generally, in such case, to bring an assise as for a disseisin, and then the judge was to examine whether it was done with a claim of right: so that, if it should turn out that he made the entry through a probable error and ignorance, and under such mistake cut down trees, or the like, and did not do it in the name of seisin, he was cleared of the imputation of a disseisin, and it was considered rather as a trespass; for which, if he acknowledged the fact, he was to make amends; if he denied it, the assise was turned into a jury to enquire of the trespass [z].

An assise was sometimes turned into a jury *propter transgressionem districtionis*, on account of a trespass committed in distraining; for a distress sometimes amounted to a disseisin, sometimes was only a trespass; and was accordingly determined, in the former case *in modum assisæ*, in the latter *in modum juratæ*. When an assise, therefore, was brought upon an injury suffered by a distress, if it could not be maintained as an assise to determine the disseisin, it might be maintained as a jury to determine the trespass [a].

From what is here said, and the little mention there is in Bracton about any original specific proceeding in case of trespass, it should seem, that though there might be a writ of trespass, it was rarely brought for entries upon land; but the usual way of considering such matters was in an assise, where the complainant was sure of inflicting some penalty on the wrong-doer, either as a disseisor or a trespassor. It should seem that the writ of trespass was a late invention not wholly approved by Bracton; for it is

[z] Bract. 216. b. [a] Ibid. 217.

said

ſaid in another part of this author's work, that the writ, *quare vi et armis* a perſon entered land, would be bad, *becauſe* it would be making a queſtion of the *mode* of the treſpaſs, when it ſhould be for the treſpaſs ſimply.

To return to the aſſiſe of novel diſſeiſin: This aſſiſe, according to Bracton, had three conſiderations: it was perſonal, *propter factum;* penal, *propter injuriam;* and thirdly, it was for reſtitution of the thing taken. As far as its object was penal (and *pœna ſuos tenere debet autores*), it did not lie for the heir of the diſſeiſee, nor againſt the heir of the diſſeiſor, if he died in the life of the diſſeiſee; for the penalty was extinguiſhed with the perſon, and the heir was not to be puniſhed for the offence of his anceſtor: nor, in like manner, would an action lie for the heir of the diſſeiſee; for as between him and the diſſeiſor there was no obligation *quoad pœnam*, though there was *quoad reſtitutionem;* but his remedy was by a writ *de ingreſſu*, ſince called a *writ of entry*. As to this writ of entry, and when it lay in the nature of an aſſiſe of novel diſſeiſin, for an heir to recover poſſeſſion, it was to be ſeen whether the anceſtor had been properly diligent in procuring and proſecuting his ſuit ſo as to have got a view, and the jurors ſworn; for then, by ſo doing, the aſſiſe of novel diſſeiſin, in caſe of his death, was ſaid to be perpetuated; that is, the right of action for the diſſeiſin, ſo far as concerned the reſtitution, continued to the heir of the diſſeiſee againſt the diſſeiſor and his heirs. Some were of opinion, that, in this caſe, the action would hold *quoad pœnam* likewiſe againſt the diſſeiſor; and though the aſſiſe was not proſecuted ſo far as the view, and electing the jurors, yet if as much diligence as poſſible had been uſed, though no action was commenced, the writ of entry was nevertheleſs continued to the heir of the diſſeiſee *quoad reſtitutionem* [b].

The form of the writ of entry, when brought after an

[b] Brac. 218. b.

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assise, was as follows: *Præcipe A. quòd justè, &c. reddat B. tantum terræ cum pertinentiis in villâ, &c. in quam non habet ingressum nisi per C. patrem ipsius A. cujus hæres ipse est, qui prædictum B. inde injustè et sine judicio dissaisivit, et postquam, &c. et unde assisa novæ dissaisinæ summonita fuit coram justitiariis nostris ad primam, &c. et visus terræ captus, et remansit assisa capienda, eo quòd prædictus C. obiit ante captionem illius assisæ* (or, *antequam justitiarii nostri in partes illas venerint*). *Et nisi fecerit, &c.* These writs of entry grounded upon a disseisin, varied according to the circumstances which had happened since the disseisin. One was, *in quam ingressum non habet nisi per C. filium et hæredem D. qui terram illam ei dimisit postquam idem D. injustè et sine judicio dissaisiverit ipsum B. &c.* Another was, *in quam non habet ingressum, nisi per talem, qui injustè et sine judicio dissaisivit talem postquam idem talis dissaisiverat querentem*[c].

In this writ the heir of the disseisor might have almost all the answers and defences which the disseisor himself, if he had lived, might have had against the assise of novel disseisin; inasmuch as this writ was in the nature of an assise of novel disseisin in all respects that regarded restitution, though not *quoad pœnam*; and all such matters would be determined by a jury. Bracton says expressly, that no corporal pain was to be inflicted by this action, on account of the disseisin of the ancestor; nor damages; nor was the customary ox to be given to the sheriff[d]; but only the *misericordia* was to be paid for the unjust detention[e].

This writ of entry grounded upon a disseisin, like other writs of entry, was an invention since the time of Glanville, and was the result of that refinement which had pervaded all parts of the law relating to *seisin* and *property*.

[c] Bract. 219.

[d] It seems that there was a custom for the sheriff to demand an ox for every disseisin proved.

[e] Bract. 220.

The

The earlieſt mention of theſe writs is in the third year of this king; when they are ſpoken of as in common uſe, and therefore it is probable that they were introduced not long after Glanville's time [f]. We ſhall have occaſion to treat more particularly of theſe new writs in their proper place. The writ which next preſents itſelf is another remedy concerning poſſeſſion, which alſo had been contrived ſince Glanville's time, and has ſince been called the writ of *Quare ejecit infra terminum.*

*Quare ejecit infra terminum.*

SUCH were the notions concerning land, that while one perſon had a freehold in a tenement, another might, ſays Bracton, have at the ſame time the uſufruct, the uſe, and the habitation [g]. As we have been ſhewing how a man was to be reſtored to his freehold if he was ejected, we ſhall now ſee what was to be done, if a perſon was ejected before the expiration of his term in the uſufruct, uſe or habitation of a tenement which he held for term of years. Such perſons, when ejected within their term, uſed ſometimes to bring a *writ of covenant;* but as that only lay between the perſon taking and perſon letting, (who alone were parties to be bound by the covenant) and the matter could not be determined, if at all, but with great difficulty in that way; proviſion was made, ſays Bracton, by the wiſdom of the court and council [h] for a farmer againſt all perſons whatſoever who ejected him, by the following writ: *Præcipe A. quòd juſtè et ſine dilatione reddat B. tantum terræ cum pertinentiis in villâ, &c. quam idem A. qui dimiſit, &c.* or thus: *Si talis fecerit te ſecurum, &c. oſtenſurus quare deforceat, &c. tantum terræ cum pertinentiis in villâ, &c. quòd talis dimiſit ipſi, &c. ad terminum qui nondum præteriit, infra quem terminum prædictus, &c. illud vendidit, &c.*

[f] Bract. 219.

[g] Theſe terms *uſusfructus*, *uſus* and *habitatio*, are borrowed from the civil law, and there ſtand in as near a relation to each other, as they are placed in here. Inſt. lib. 2. Tit. 4. 5.

[h] *De conſilio curiæ proviſum.*

*occaſione*

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*occasione cujus venditionis ipse, &c. postmodum, &c. de prædictâ terrâ ejecit, ut dicit; et habeas ibi, &c.* or, *Si A. fecerit te securum, &c. tunc summone B. quòd sit coram, &c. ad respondendum eidem A. quare injustè ejecit eum de tanto terræ, &c. quam C. ei dimisit ad terminum qui nondum præteriit, infra quem terminum, &c.*

If this writ lay against a stranger *propter venditionem*, much more ought it to lie against the person himself who demised the land, if he ejected his own farmer. In such case the writ was, *quam C. de N. ei dimisit ad terminum qui nondum præteriit, infra quem terminum prædictus C. de eâdem firmâ suâ injustè ejecit, ut dicit; et nisi fecerit, &c.* and this was, with little variation, the more common form in case of ejectment by a stranger. These writs were drawn in two ways, both of which we have noticed in the above instances; the one of a *præcipe*; the other two of a *si te fecerit securum*. The *præcipe* was thought the best and most compendious proceeding, on account of the process of caption of the land into the king's hands, which lay upon that writ; and the avoiding the tediousness and delay of attachments, which was the process upon the writ of *si te fecerit securum, &c.* though we shall see, in after-times, that the latter became the most common and best known of the two, being that which, from the words of it, was called a *quare ejecit infra terminum*[i].

Assise of common.

Thus we have gone through the remedies which the law had provided where an injury was done to a man's seisin of a freehold. It follows next in order, to speak of injuries done to a seisin of things appurtenant to a freehold, such as common of pasture, and the like. We have seen, that in Glanville's time there was an assise of common of pasture, by which the complainant might recover his seisin of a common, the same as seisin of his

[i] Bract. 220.

land;

land; and that there was a writ directing an admeasurement of pasture to be made, where any one had surcharged the land. The forms of these two writs were the same now as in his time [k]. The writ of admeasurement was executed by the sheriff, who was to go in person to the place where the common lay, and cause the hundredors and all who were interested in the admeasurement to meet; and there, in presence of the parties to the writ, if they obeyed the summons to appear, and after hearing their allegations, he was to make inquiry, by the oaths of such neighbours by whom the truth could best be known, and by the inspection of charters and instruments, how the right was; and, according to that, he was to admeasure and allot the common [l]. This was the writ upon which admeasurements were usually made. But where a person overcharged his common beyond what his ancestors had ever claimed, the admeasurement used to be made by a writ, invented since Glanville's time, to the following effect: *Si A. fecerit, &c. tunc, &c. quòd sit coram justitiariis ad primam assisam, ostensurus quare superonerat, &c. aliter quàm C. pater ipsius B. cujus hæres ipse est, consuevit:* upon which the justices were to proceed as the sheriff in the former instance did, and a summary inquisition was made concerning the matter in dispute [m].

ANOTHER writ had been introduced, called a writ *de quo jure*. Where a person had recovered seisin of a common in an assise, grounding his title upon usage and sufferance merely; as this determined only the seisin, the chief lord might bring this writ to make the tenant shew QUO JURE *exigit communiam pasturæ, &c. defecit ille nullam communiam habet, &c. nec servitium ei facit quare, &c. habere debeat, &c* [n].

THE writ in Glanville to the sheriff, commanding him, that *præcipias R. quòd, &c. permittat habere H. aisiamenta*

[k] Vid. ant. 190. Bract. 224 and 229.

[l] Ibid. 229.

[m] Ibid. 229. b.

[n] Ibid. 229. b. 230.

*sua*,

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*ſua, &c.* [o]. was preſerved, with ſome ſmall difference in the form. He was directed, that *juſticies R. quòd, &c. permittat H. habere rationabile eſtoverium, &c.* as the caſe might be, of wood, turbary, and the like [p].

Of nuiſance.

As a nuiſance, being an injury to a freehold, was conſidered in the nature of a diſſeiſin, and like that might be redreſſed by an aſſiſe; ſo alſo, like that, it might, *flagrante facto*, be removed by the party injured, without any ceremony of application to the law: but after the party had laid by, he had, as in caſe of a diſſeiſin, no redreſs but by writ [q].

THERE is no mention in Glanville of any other writ of nuiſance than the aſſiſe. We find now ſeveral writs to the ſheriff upon queſtions of nuiſance. One of theſe was, *Queſtus eſt nobis talis, quòd talis injuſtè et ſine judicio levavit quendam murum* (or whatever it might be) *ad nocumentum liberi tenementi ſui, &c. poſt reditum noſtrum de Brittanniâ in Angliam* [r]: *Et ideò tibi præcipimus, quòd loquelam illam audias, et poſtea eum inde juſtè deduci facias, ne amplius, &c.* In the ſame manner writs might be formed, *quare, &c. proſtravit injuſtè ad nocumentum liberi tenementi*; *quare, &c. viam obſtruxit, &c. quare divertit curſum aquæ, &c.* and ſo on, in numberleſs caſes of injury and nuiſance to a man's freehold [s]. Theſe laſt writs authorized the ſheriff to hear and determine the matter; and ſo were to all intents and purpoſes writs of *juſticies*, though that word was introduced only in the following: *Juſticies, &c. quòd, &c. permittat H. habere quandam viam in terrâ ſuâ, &c.* The writ of aſſiſe of nuiſance did not differ in form from thoſe in Glanville, except in the return now

[o] Glanv. lib. 12. c. 14. Vid. ant. 374.

[p] Bract. 231.

[q] Ibid. 231. b.

[r] We have before ſeen that by the Stat. Mert. writs of novel diſſeiſin were not to exceed *primam tranſfretationem domini regis qui nunc eſt in Vaſconiam.* Vid. ant. 264. Notwithſtanding which, we find Bracton ſtates this writ with a different limitation. It is not eaſy to account for this want of agreement between our author and the ſtatute. Vid. ant. 325.

[s] Bract. 233.

uſed

used in all assises, *coram justitiariis nostris ad proximam assisam*[t]. The proceedings upon this writ were the same as in an assise of novel disseisin of a freehold. So much were assises of common and of nuisance considered in the same light as assises of freehold, that where either of the parties died after the injury done, and the writ was to be brought by or against the heir, we find a sort of writ of entry was formed, in the nature of those we before mentioned for recovery of lands: *Præcipe quòd, &c. reddat B. communiam pasturæ, &c. Præcipe quòd, &c. relevari faciat et reparari quoddam fossatum, &c. Præcipe quòd permittat talem relevare, &c*[u]: adapted, in the words of them, to the nature of the case, without any mention of an entry, which indeed would have been incoherent and absurd.

A NUISANCE was so much in the nature of, and approached so near to, a disseisin, that sometimes it might be considered in either light; and it was difficult to say which it properly was. Suppose a person caused water to overflow; if it rose upon the complainant's own freehold, which it most probably would if he had land on both sides, this was thought rather a disseisin than a nuisance; but if it rose only on the freehold of the wrong-doer, and from thence incommoded that of the complainant, it was then only a nuisance, because the fact was all in the wrong-doer's land. But if part was in one, and part in the other, and the water run over both grounds; then, for one part, he might have an assise of novel disseisin of freehold; for the other, an assise of nuisance; so that here would be two assises on account of the same land; in which case, of the two remedies, if one was to be chosen, Bracton advises the assise of nuisance, as the most likely to remove the whole mischief: for the assise of novel disseisin, as it was confined to the freehold, could not correct the nuisance which was upon the other's land; while the assise of nuisance, by re-

[t] Bract. 233. b. [u] Ibid. 235. b. 236.

moving

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moving the cauſe, effected both [x]. A man might commit a diſſeiſin and two nuiſances, by doing one fact on his own ground. If he cut a ditch acroſs a road which led to a paſture, he, at once, committed a diſſeiſin of the common; cauſed alſo one nuiſance by obſtructing the way, and another by diverting the water from its proper channel [y].

Among other nuiſances, a liberty or franchiſe might be a nuiſance to another liberty or franchiſe; as where the liberty of holding a market was granted, ſo as not to become a nuiſance to a neighbouring one. Now, a market was ſaid to be *vicinum*, or neighbouring, if it was ſix miles and a half [z], and one-third of the other half diſtant from another; which diſtance was computed with a view to the following conſiderations: ſuppoſing a day's journey to be twenty miles, and the day was divided into three parts, the firſt part would ſuffice for the journey thither; the ſecond, for buying and ſelling; and the third, for returning home in reaſonable time before night. A market, if raiſed within this diſtance, was to be put down; yet a market to be held two or three days *after* another, though within that diſtance, could not be ſaid to be injurious; and, accordingly, a market was not conſidered as a nuiſance [a], unleſs it was held before or at the time of another.

Before we take leave of aſſiſes of novel diſſeiſin, it will be neceſſary to remark two or three particulars relating to them in general. If a diſſeiſin happened *infra ſummonitionem juſtitiariorum*, there was no need of applying to the *curia regis* for a writ; but the itinerant juſtices would make one themſelves, in this form: *Talis de tali loco, et ſocii ſui juſtitiarii itinerantes in tali comitatu tali ſalutem. Queſtus eſt nobis*, and ſo on, as in other writs; only inſtead of the term of limitation, theſe words were inſerted, by way of

[x] Bract. 234. b.

[y] Ibid.

[z] *Sex leucæ.* Spelman ſays, that in Domeſday, and our old writers, *leuca* ſignifies *a mile.* Spel. voce Leuca.

[a] Bract. 235.

giving

giving jurisdiction to the court, *infra summonitionem itineris nostri* [b].

We have seen what provision was made by the statute of Merton in case of re-disseisin [c]. If a person recovered seisin by judgment of the justices itinerant, and was put in seisin by the sheriff, and was afterwards disseised by the same disseisors; they, being convicted thereof, were to be taken and detained in gaol, till released by the king or otherwise; and for the purpose of taking the offenders there issued the following writ to the sheriff: *Monstravit nobis talis, quòd cùm ipse recuperâsset;* mentioning the assise, and so on; *ipse talis, &c. iterum, &c. disseisivit: et idèo tibi præcipimus, quòd assumptis tecum custodibus placitorum coronæ nostræ, et* 12 *tam militibus quàm aliis liberis et legalibus hominibus, &c. diligentem facias inquisitionem, &c. Et tunc ipsum capias, & in prisonâ nostrâ salvò custodias, donec aliud inde præceperimus, et inde tali seisinam suam rehabere facias, &c.* And, in like manner, in all cases where seisin was recovered in court, whether by assise, recognition, jury, judgment, concord, or otherwise, and the recoverer was turned out, a writ of *monstravit* to this effect might be had [d].

Next, as to the writ of execution to give seisin to the complainant. When an assise happened, as it sometimes did, to be taken out of the county, and the person who brought the assise complained in the county that he had not yet got his seisin, there issued a writ to the following effect to the sheriff: *Scias quòd A. &c.* recovered by assise; *et idèo præcipimus, quòd per visum recognitorum ejusdem assisæ, &c. plenariam seisinam habere facias, &c.* the writ being still varied, according as the disseisin was confessed, or otherwise. To every writ was added this clause: *Et etiam pro damnis ei adjudicatis infra quindenam facias ei decem solidos habere, ne inde clamorem audiamus pro de-*

[b] Bract. 236. b. [c] Vid. ant. [d] Bract. 236. b. 237.

*fectu,*

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*fectu, &c.* If seisin had been recovered before the justices in the county, and the complainant was hindered from getting possession by the power of his adversary, he might have the following writ to the sheriff: *Questus est nobis, &c. quòd cùm in curiâ nostrâ recuperâsset seisinam, &c. idem, &c. non permittit eum uti seisinâ suâ*; or, *seisinam suam nondum habet, secundum quòd ei fuit adjudicata. Et ideo tibi præcipimus, quòd diligenter inquiras qui fuerunt recognitores ejusdem assisæ, et per eorum visum, &c. plenariam seisinam ei habere facias, et ipsum in seisinâ suâ manuteneas, et defendas*; or thus, *non permittas, quòd talis ei molestiam inferat, vel gravamen, quominùs idem, &c. uti possit seisinâ suâ, ne amplius, &c*[e].

*Assisa ultimæ præsentationis.*

We have hitherto spoken of such remedies as were furnished when a person was disseised of his freehold, or of some easement and right appurtenant to his freehold, and arising out of that of a stranger. We are now to treat of appurtenances and rights which arise in a man's own ground; as of the seisin of a presentation; and when a person was impeded in the use and enjoyment of his own seisin thereof, or that of his ancestor. When a person presented to a vacant church, to which himself or his ancestors had before presented *tempore pacis* (for every one must have a seisin of his own, or of his ancestor who last presented), and was impeded or deforced by any one who contested the presentation; this was to be determined by an *assisa ultimæ præsentationis*, as we before mentioned in the reign of Henry II[f]. As this assise could only be brought by one who had had seisin himself, or whose ancestors, to whom the advowson had belonged, had had seisin, those who held by feoffment, and not by descent, could not maintain it, unless they had, in fact, made one presentation: for they could not claim of the seisin of those whose heirs they were not, in an assise, any more than they could in a writ of

[e] Bract. 237. [f] Vid. ant. 185.

right;

right; nor could one who held for life, as in dower, or the like; all which perſons were redreſſed by another ſort of writ [g].

THE *aſſiſa ultimæ præſentationis*, or the writ of *darrein preſentment*, as it was afterwards more uſually called, differed in one or two particulars from that in Glanville's time. The preſent began, *Si talis te fecerit ſecurum*, &c. the former was a ſimple ſummons. The preſent was made returnable; ſometimes, according to Bracton, *coram juſtitiariis noſtris ad proximam aſſiſam* (notwithſtanding the proviſion of *Magna Charta* to the contrary) [h]; ſometimes *apud Weſtmonaſterium*.

THE proceſs on this writ was as follows: At the firſt day each party might eſſoin himſelf, if he pleaſed. If both made default, the ſuit failed, and the writ was loſt. If the diſturber only of the preſentation was preſent, the judgment was, *quòd recedat ſine die*. If the complainant only was preſent, then it was firſt to be ſeen, whether the diſturber had been ſummoned, or not: if he had, and the ſummons was teſtified by the proper ſummoners, then he was to be re-ſummoned; but if he had not been ſummoned, or the ſummons was not proved, or, upon appearing, he objected that he had not been ſummoned, or the ſummons was not a reaſonable one, another day was given him; and at that day, if the ſummons was proved, or not denied, there iſſued a writ of re-ſummons, by which he was ſummoned to hear the recognition that had been arraigned, with the addition of this clauſe, *et ad oſtendendum quare non fuit coram*, &c. *ſicut ſummonitus fuit*, &c. At the day appointed, if he made his appearance, he was not permitted to take ſuch objection to the ſummons as would delay the aſſiſe, whether the firſt or ſecond ſummons was proved or not, as the day had been appointed before, and he knew he was to be ſummoned; and if he did not come,

[g] Bract. 237. b. 238. [h] Vid. ant. 245.

the

the aſſiſe was taken by default, provided the jurors were preſent. If they were not preſent, then there iſſued to the ſheriff a writ, which ſometimes was, *quòd venire facias*, &c. ſometimes *quòd habeas corpora*, &c [i]. for the jurors to be preſent at another day; at which time if he did not appear, the aſſiſe would be taken by default.

Again, if at the firſt day of ſummons the tenant eſſoined himſelf, and had another day given, and did not appear at it, the aſſiſe was immediately taken by default, without any re-ſummons; alſo, if he appeared, and the jurors not, there was always one eſſoin on account of the appearance.

In this manner was a re-ſummons allowed when the aſſiſe was taken out of the county, or before the juſtices ſpecially aſſigned. But before the juſtices itinerant in that county *ad omnia placita*, no re-ſummons, nor the delay of fifteen days were allowed, if the tenant was in the ſame county with the church in queſtion at the time of the iter; but the aſſiſe was taken by default, the ſame as an aſſiſe of novel diſſeiſin [k]. Again, a re-ſummons was not allowed as againſt a perſon within age, nor a minor; nor where the tenant had been ſeen in court, and had contumaciouſly gone away. In ſhort, in every aſſiſe but that of novel diſſeiſin, there was at the firſt day either an eſſoin or a re-ſummons; but at another day, there was no re-ſummons after an eſſoin; nor, on the contrary, an eſſoin after a re-ſummons; but the aſſiſe was immediately taken by default, as ſome ſaid: and Bracton was further of opinion, that even the eſſoin *de ſervitio regis*, though it lay after an eſſoin and re-ſummons in every aſſiſe where they lay, would not hold in this aſſiſe *ultimæ præſentationis*, which, as well as an aſſiſe of novel diſſeiſin, was excepted from this

[i] It does not appear from Bracton what rule governed in the application of one or the other of theſe writs; much leſs can it be collected that the *habeas corpora* never iſſued but after the *venire facias*, as was the courſe in later times.

[k] Bract. 238.

eſſoin,

eſſoin, for the ſake of expedition and diſpatch. We have been more particular in this account of the practice in re-ſummons, becauſe it is applicable to all the remaining aſſiſes of which we ſhall have to treat[l].

If, after theſe ſummons, re-ſummons, and eſſoins, the deforceant did not come, would not anſwer, or contumaciouſly left the court; the aſſiſe, as we ſaid before, was taken by default. If he appeared, and could ſay nothing why the aſſiſe ſhould remain, it proceeded at once; the deforceant, in this aſſiſe, being allowed to call no warrantor, becauſe the aſſiſe was taken generally, for him who had the right of preſenting[m].

When the complainant and deforceant appeared, and the latter was diſpoſed to ſay ſomething againſt the aſſiſe, then, ſays Bracton, it became the complainant to ſtate his caſe (or, *profundare intentionem*, as it was called), and ſhew what title he had to the action; after which the deforceant was to ſtate his exceptions to the *intentio* of the complainant, and ſhew why the aſſiſe ſhould remain. The matter of the intention and exception was what conſtituted the merits of the title, and was collected from the effective words of the writ: *Quis advocatus—tempore pacis—præſentavit—ultimam perſonam—quæ mortua eſt—ad eccleſiam talem—quæ vacat, cujus advocationem dicit ad ſe pertinere:* that is, who was the real *patron* and owner of the advowſon, and that he was not a guardian or farmer, or tenant for years, who poſſeſſed *nomine alieno*, or for life, or by intruſion, or diſſeiſin; who, beſides not being properly owners, had never, perhaps, preſented, and therefore never had gained ſeiſin of the preſentation:—whether he obtained this right in times of quiet and *peace*, and not by uſurpation and oppreſſion:—whether the *preſentation* was rendered complete by inſtitution; for ſince the Conſtitution of the Council of Lateran, ordaining that preſentations ſhould

[l] Bract. 239. [m] Ibid.

lapſe

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lapse to the bishop if the patron did not present in six months, had been adopted in our law, it oftener happened that presentations, not being in time, were disputed:— whether it was a *parson* that was presented; for an assise did not lie of a vicarage or prebend, nor of a chapel:— whether his *death* was natural or civil, as by entrance into religion, resignation, or, what was the same, marriage, or any other act which disabled him from holding his church; and whether it was *vacant*. The question of vacant, or not, was to be determined by the ordinary, who was the proper and legal judge thereof [n].

Exceptions thereto.

From the above-mentioned articles of the writ might be extracted exceptions, both to destroy and defer the assise; but should the deforceant admit them all, he might still except against the assise in various ways. He might say, that the complainant who grounded his assise upon the seisin and presentation of his ancestor, after that presentation made a gift of the advowson, either by itself, or with the freehold to which it was appendant, to the deforceant himself, by a charter, which he there produced; and therefore, that though the ancestor might present, yet he could not for that reason present after. To this the complainant might reply, that after the charter mentioned he presented *N.* who was admitted, so that the charter was void, and the gift null; and this he could prove by the assise taken *in modum juratæ*, unless the deforceant chose to make a *triplicatio*, or rejoinder, and say, that though that charter might be void, and the gift null, by such second presentation of the donor; yet after such second presentation, he made another charter to him confirming the former, which had been invalidated by the second presentation: and this he might offer to prove by the assise and witness named in the charter, if the other party simply denied the charter and confirmation, and did not chuse to go on by a *quadrupli-*

[n] Bract. from 240 to 242.

*catio*,

*catio*, or surrejoinder, and say, that after all which was stated, he had since made another presentation [o]. The sense of all this pleading was, that the last exercise of right by presentation overbalanced every consideration arising from the right to make that presentation; and so stood the law, conformably with that deference which was universally shewn our old jurisprudence to seisin, or possession, whatever the right of that seisin and possession might be.

It might be excepted, that the complainant had aliened the land to which the advowson was appendant, *cum omnibus pertinentiis*; or that he had not in his hands any part of the freehold to which it was appendant, but had lost it all by judgment or by disseisin: for though he might have a right to the freehold and its appurtenances, he was first to recover that, before he could present [p]. These and many other matters might be excepted against the assise.

Nothing can better shew the nature of this assise, how far it had effect, and where it failed, than some cases determined in this reign. In one of these it was held, that when it could not be proved who made the last presentation, nor the next before, nor the next before that, the plea should proceed upon the mere right and property, by that same writ of assise, without recurring to any writ of right: a *narratio* therefore, or count, was immediately to be made of the seisin of an ancestor, and of the right descending to the demandant, as if it had been *ab initio* a suit upon the right; and the tenant might, as he chose, put himself upon the great assise, or defend himself by duel. Another case was this: Suppose a man had an advowson of a church, and being in seisin of the presentation, gave it in marriage, and afterwards, before he made any presentation, the donee gave it again to another, and then the church for the first time became vacant; upon which the donor, the first donee, and the second donee, all presented: in this case,

[o] Bract. 242 b. [p] Ibid. 242 b. 243.

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the donor would, in an aſſiſe for the preſentation, be preferred to the other two; for the firſt donee had no true ſeiſin, ſo as to transfer the advowſon to another; nor could the ſecond donee receive what the firſt could not give him: and ſo it was determined in more caſes than one, that where a perſon, to whom an advowſon was given, conveyed it away before he had preſented to it, the conveyance was null, becauſe there was no remedy to give it effect [q].

Of *quare impedit.*

As perſons, in the foregoing inſtances, having preſentations, could not go upon any ſeiſin of their own or their anceſtors; and in all caſes, as thoſe who had by any lawful means acquired a right of preſentation, whether by gift or by judgment, for life or in perpetuity, would, if they had not preſented before, have been unable to maintain their right in an *aſſiſa ultimæ præſentationis*, or a writ of right of advowſon; remedies had been deviſed ſome time in this reign by two writs, one called *quare impedit*, the other *quare non permittit*; for ſo Bracton calls it, though the words of the writ are *quòd permittat*. The difference between theſe two writs of *quare impedit* and *quare non permittit*, is thus explained by Bracton: *Impedire eſt ponere* PEDEM IN *jus alienum, quod quis habet in jure præſentandi.* When a right, whatever it might be, was accompanied not with a proper ſeiſin, but a *quaſi ſeiſina*, in ſuch caſe the remedy was by *quare impedit.* But if the perſon preſenting had not even this *quaſi ſeiſina*, but clearly none at all; as where a right of preſentation accrued by donation, or by reaſon of a tenement holden for life, as in dower, or *per legem terræ*; or to a farmer by reaſon of his farm; to a creditor by reaſon of a pledge, where no ſeiſin nor *quaſi* ſeiſin was had; there, as no one could be ſaid *ponere pedem in jus*, or in a *quaſi* ſeiſin (which the perſon in fact never had), a *quare impedit* would not hold, but recourſe muſt be

[q] Brac. 245. b. 246.

had

had to the *quare non permittit*; which purported that the perſon who had the property, or *proprietas*, did not permit him who was in poſſeſſion to uſe his *jus poſſeſſionis*.

THE writ of *quare impedit* was as follows: *Quia A. fecit nos ſecuros de clamore, &c. pone per vadium, &c. ad reſpondendum eidem A.* QUARE IMPEDIT *eundem A. præſentare idoneam perſonam ad eccleſiam de M. cujus eccleſiæ advocationem idem A. nuper in curiâ noſtrâ coram juſtitiariis noſtris apud Weſtmonaſterium recuperavit verſus eundem B. per judicium curiæ noſtræ; unde idem A. queritur quòd prædictus B. injuſtè et contra coronam noſtram*, or *in contemptum curiæ noſtræ eum inde* IMPEDIT: *& habeas, &c.* This was the form of the writ of *quare impedit*, which has rather the appearance of a writ of execution, or at leaſt a judicial proceſs to enforce a judgment in ſome action, than an original writ. The writ of *quare non permittit* was as follows: *Præcipe A.* QUÒD *juſtè et ſine dilatione* PERMITTAT *B. præſentare idoneam perſonam ad eccleſiam, &c. quæ vacat, et ad ſuam ſpectat donationem, ut dicit; et unde queritur quòd prædictus A. eum injuſtè impedit. Et niſi fecerit, et idem B. fecerit te ſecurum, &c. tunc ſummone, &c. quòd ſit coram juſtitiariis noſtris, &c. oſtenſurus quare non fecerit, &c.* From the comparing of theſe writs, it ſeems, ſays Bracton, that the *quare impedit* and *quare non permittit* come to the ſame thing[r]; in which obſervation later times have agreed with him; for the writ of *quare impedit*, which ſeems to have been very recently introduced, and in a very unfiniſhed ſtate, ſoon became obſolete[s], and the *quare non permittit* was continued, and is ſtill in uſe, under the name, however, of *quare impedit*.

*Quare non permittit.*

THE proceſs in this writ was as follows: If the party did not appear to the ſummons on the firſt day, nor eſſoin himſelf, then the old practice (before the Council of La-

[r] Bract. 247.

[s] Vid. 2 Weſt. 13 Ed. I. c. 5. where a writ of right, of *ultimæ præſentationis*, and *quare impedit*, are mentioned as the only original writs to recover advowſon.

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teran, when no time run in caſe of vacancy of churches) was to attach the impeders by pledges, and ſo on by better pledges, and to run through the whole ſolemnity of the proceſs by attachment: but ſince that time, the courts had got into the uſage of proceeding with more diſpatch; in a way, ſays Bracton, not warranted by law, yet, as he admits, ſuch as was excuſed by the neceſſity of the caſe, which required that a lapſe ſhould be prevented, if poſſible. This was, in the firſt inſtance to diſtrain the impeder, either by directing the ſheriff, *quod habeat corpus ejus*, or *quòd diſtringat eum per terras et catalla, quòd manus non apponat*, or *quòd faciat eum venire. Hoc*, ſays Bracton, *provenit non per judicium, ſed per conſilium curiæ*, to diſappoint and puniſh the malice of thoſe who hindered preſentations in order that lapſes might happen[u]. It ſeems this proceſs was warranted by the order of the court merely, and it is ſpoken of by Bracton as an intrenchment on the regular courſe of proceeding, that was to be excuſed by the nature of the caſe. The legiſlature at length interpoſed to authorize this proceeding, and ſettled it ſomewhat in the manner it is here ſtated[x].

If the impeder was within age, and had nothing by which he might be diſtrained, then the perſon in whoſe hands he was, and by whoſe advice he was directed, was to be ſummoned: *Ibi habeas B. qui eſt infra ætatem, et in cuſtodiâ tuâ, &c. ad reſpond. &c.*

It was the opinion of ſome, that the patron only was to be ſummoned, and not the clerk, becauſe he claimed nothing in the advowſon. But in truth, ſays Bracton, it was firſt to be ſeen, whether it was the patron or the clerk that cauſed the impediment; for both might be impeders at different times; the patron before he loſt the preſentation by judgment, and the clerk by afterwards inſiſting on it: and in this caſe, the clerk was to be ſummoned as a princi-

[u] Bract. 247. [x] By the Stat. Marlb. 52 Hen. III. c. 12. Vid. poſt.

pal

pal impeder, and the patron only incidentally, to shew what right he could claim in a presentation which he had once lost by judgment of law. If a patron caused a clerk, properly instituted, to be summoned for impeding his presentation, he might answer, that the church was not vacant; which would be tried by the bishop; or he might say, that he claimed nothing in the advowson, nor impeded any one by presenting, but that he himself was already in possession, and therefore that the church was not vacant.

LEST the bishop should put an incumbent into the church *pendente lite*, before the six months elapsed, there used to go an inhibition *ne incumbraret*, or, *ne clericum admittet*, &c. so that the bishop could not afterwards admit any one, till the suit depending was determined. If, however, the last presentation was determined in one suit, and another was depending upon the right, the bishop was to admit a clerk presented by him who had the last presentation, notwithstanding the prohibition[a].

WHEN a person recovered seisin by assise or darrein presentment, by *quare impedit*, or *quare non permittit*, there went a writ to the bishop *ad admittendum clericum*, which usually stated the record and judgment in the action. When these writs were occasioned by either of the two last actions, there was a clause inserted, which was left out in that which issued after an assise; and as this shews a remarkable difference between these actions, it may be worth noticing. In the case of a *quare impedit*, and *quare non permittit*, a clause was inserted in this writ, which directs that the clerk should be admitted *non obstante reclamatione talis*, naming the unsuccessful party. Now, as a *quare impedit* and *quare non permittit* were actions between certain parties, who were to abide the judgment given between them, neither ought to resist the execution thereof, and such a clause was very proper. But in an assise of darrein present-

[a] Bract. 247. b. 248.

ment

ment it was otherwiſe; for though the ſuit was between certain parties, yet the aſſiſe was not only to enquire of their right, but of that of any other perſons whatſoever; the writ directing the jurors to recogniſe generally *quis advocatus*, *who*, and not whether either of the parties only, made the laſt preſentation; and therefore it would be in vain to ſay, *non reclamante* the perſons named in the writ, when any other perſon might reſiſt it, if the aſſiſe declared for him, though he was not named in the writ [b]. When this aſſiſe was taken *in modum juratæ*, the iſſue in ſuch caſe not being *quis*, *&c.* but on a collateral fact, then this clauſe was inſerted.

If the clerk of the patron who loſt in the aſſiſe, inſtituted any ſuit againſt the other clerk in the ſpiritual court, there went a prohibition to ſtop it, as we before ſaw in Henry II.'s reign [c]. Should the biſhop neglect to obey the writ *ad admittendum clericum*, there iſſued another of *quare non admiſit*; upon which lay the proceſs of attachment: and upon this, enquiry might be made into the reaſons and propriety of the delay [d]. Thus far of theſe writs of poſſeſſion concerning preſentations. The writ of right of advowſon belongs to another place.

And now we have gone through the remedies the law provided, where a man was diſturbed by violence or otherwiſe from his *own proper* ſeiſin. We are next to ſpeak of the ſeiſin of *another*; the principal of which is, that of an anceſtor: in ſuch caſe, the method in which the next heir might recover, was by *aſſiſa mortis anteceſſoris*.

*Aſſiſa mortis anteceſſoris.*

The writ of *mortis anteceſſoris* preſerved now the form it had received in Glanville's time [e], with the ſingle variation of the return, and limitation. The limitation, according to the alteration made by the Stat. Merton, was, *ſi obiit poſt ultimum reditum regis Johannis patris noſtri de*

[b] Bract. 248. b.
[c] Ibid. 250. b. Vid. ant. 141.
[d] Bract. 251. b.
[e] Vid. ant. 178.

*Hibernia*

*Hiberniâ in Angliam;* the return was, *coram juſtitiariis noſtris ad primam aſſiſam, cùm in partes illas venerint:* though to theſe variations it may be added, that whereas in Glanville's time it ſeems to have been only on a father's dying ſeiſed, it was now extended further, to the death of a mother, brother, ſiſter, uncle, and aunt [f]. Theſe were the degrees within which an aſſiſe was limited; for a proper writ of mortauncestor never was allowed ſo high as the grandfather (though there was a writ *de morte avi*, and *aviæ*, which Bracton calls partly a mortauncestor, and partly a writ *de conſanguinitate*), nor in deſcent ſo low as the grandſon; no aſſiſe being allowed of the death of one or of the other, though a grandſon might have an aſſiſe of the death of his uncle or aunt, as before ſaid. Again, this aſſiſe would not lie *inter conjunctas perſonas*, as brothers and ſiſters, grandſons and grand-daughters [g]. We ſhall afterwards ſee how the writ *de conſanguinitate* was framed to ſupply ſome of theſe defects.

In an aſſiſe of mortauncestor the proceſs was a re-ſummons, in the ſame manner as was before mentioned in the aſſiſe of darrein preſentment; and if at length the parties appeared, but the jurors did not, then there was an award, that *ponatur aſſiſa in reſpectum pro defectu juratorum*; and they were called together again by a *habeas corpora juratorum*, juſt as was ſtated in that aſſiſe [h]. It appears in Glanville's time that the tenant was not to be waited for after the firſt ſummons.

When both the demandant and tenant appeared in court, the tenant might call a warrantor; a privilege which Glanville does not mention as allowed in this writ; upon which there iſſued a ſummons *ad warrantizandum*. If at the day the demandant and tenant appeared, but the warrantor made default, then the aſſiſe was taken by the default of the warrantor; nor was any proceſs of diſtreſs by caption of his land,

Vouching a warrantor.

[f] Bract. 254. 261. b. [g] Ibid. [h] Ibid. 255. 255. b. 256.

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land, or otherwiſe, allowed againſt the warrantor, till the aſſiſe was taken, and it was known whether the tenant loſt or retained his land, and ſo whether he needed any recompence from his warrantor: and even ſhould the aſſiſe not be taken on that day for want of jurors, or for any other cauſe, and the warrantor appeared before it was; yet, notwithſtanding, he would not be heard till the aſſiſe had firſt been taken. If the tenant loſt by the aſſiſe, they proceeded againſt the warrantor, and diſtrained by the writ of CAPE *in manum domini regis, &c. de terrâ ipſius A. ad valentiam terræ, &c. quia B. recuperavit verſus, &c.* If the warrantor appeared in obedience to this compulſory proceſs, he either entered into the warranty, or pleaded he was not bound to give a recompence in value; for this obligation of his warranty was the only point which he could now deny, it being in vain to ſay any thing about the other of defending him in his ſeiſin, that being loſt by the aſſiſe. If he could not defend the recompence in value, he was immediately to make the uſual ſatisfaction to the tenant.

IF the warrantor appeared at the firſt day, he either entered into the warranty, or ſhewed why he did not. If he entered into the warranty, he might make all the anſwers and exceptions the tenant might; and he became, in fact, the very tenant; he might call others to warrant him; and if the laſt warrantor could not deny his warranty, or the aſſiſe was taken by his default, he was to give a recompence in value to his feoffee, and that feoffee to his, and ſo on, to the tenant in the action.

WHEN the warrantor denied that he was bound to warrant, no other penalty, as we ſaid before, was inflicted on the tenant, but that the aſſiſe was taken by default; and this was the great difference between the ſituation of a tenant under theſe circumſtances in an aſſiſe of mortauncеſtor, and in a writ of right: and with reaſon; for in the aſſiſe, the warrantor was only to defend againſt the aſſiſe, by ſaying ſomething to ſhew that it ought to remain;

main; and if he could not say any thing to that effect, the assise proceeded of course, and the question was only upon the possession: whereas in a suit *de proprietate*, the warrantor was called to answer to the demand, and defend the very right; and he was bound to shew that the demandant had no right; and if he could not do this, there was a judgment, that the land should be lost for want of a defence [i].

When the demandant stated his *intentio*, he was then to establish and prove, by the assise *in modum assisæ*, all the articles of the writ, namely, *quòd talis antecessor*, of whose seisin he claimed, *fuit seisitus in dominico suo, ut de fœdo, die quo obiit*, and *post terminum*, &c. which was the limitation in these writs; and if he failed in one of these articles, the assise was as much lost as if he had failed in all [k]. To all or some of these the tenant, if he could not call a warrantor, as before stated, might answer and make his exceptions, shewing why the assise should not proceed; and for proof of what he said, was (as in the other assises) to put himself upon the assise *in modum assisæ*, or *in modum juratæ*, according to the nature of the allegation: for this assise, as well as that of novel disseisin, was sometimes turned into a jury, to try the truth of such collateral facts as might be alledged against the assise proceeding. The sort of facts which would occasion this change, and the manner in which it was conducted, it would now be unnecessary to enumerate particularly, after what has been said on the assise of novel disseisin. The writ of *seisinam habere facias* was various, according to the circumstances of the proceeding in court: whether the recovery was by the assise, by judgment, by confession, it was always so mentioned: *Scias, quòd A. &c. recuperavit, &c. per assisam, &c* [l].

We shall therefore conclude what we have to say upon the writ of *mortis antecessoris*, by shewing between what

Where this writ would lie.

[i] Bract. 257. b. to 261. [k] Ibid. 261. b. [l] Ibid. 256.

persons

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*perſons* it would hold, and adding a few remarks upon the *inſtances* where it was not allowed. The reaſon of confining this writ within certain degrees was an anxiety, leſt, by extending it further, queſtions *de proprietate* might be ſometimes determined by an aſſiſe, which was a proceeding only deſigned for diſputes about the poſſeſſion. This writ would not lie between *conjunctas perſonas*, as co-heirs, whether they were parceners, that is, capable of taking an inheritance deſcending from a common anceſtor, or not capable; for if they were co-heirs capable of taking, that is, if the inheritance was partible, as among daughters, or, by particular cuſtom, among the ſons; recourſe was to be had to the writ *de proparte*; and if, in ſuch caſe, an aſſiſe was brought, it would be loſt by the exception of the mere right; as each of them was the *hæres propinquior* to his own ſhare, compared with thoſe in a remoter degree. And again, where they were co-heirs (who were by law conſidered *quoad ſeiſinam* as *juſti et propinqui*), though not parceners, or capable to take, as above ſuppoſed, but one of them, to whom the *jus merum* deſcended, was preferred to the others; yet, even in this caſe, the aſſiſe would not lie, as it only would determine the poſſeſſion and ſeiſin, reſpecting which they were conſidered all equally *juſti et propinqui*; but recourſe was to be had to the writ of right, which determined both the ſeiſin and the mere right [m].

As this writ would not lie between co-heirs that were legitimate, capable or not capable, ſo neither would it between legitimate and natural children: for if it was objected to a natural brother that he was a baſtard, or a villain, though he ſhould prove himſelf legitimate and free, he would not thereby prove himſelf *hæres propinquior*, which muſt be done before the right could be decided; and there-

[m] *Seiſinam et merum jus.*

fore,

fore, as that could not be in this aſſiſe, they muſt reſort to the writ of right [n].

It had been ſaid by Glanville, that this aſſiſe would not lie in burgage tenure [o], on account of a particular law; the effect of which law we may gueſs at, when we learn from Bracton, that the reaſon of this was, becauſe many boroughs had a particular cuſtom, which enabled the burgeſſes to make wills of land; and where that prevailed, it was to no purpoſe to enquire by this writ, whether the anceſtor died ſeiſed. He ſays, that the freemen of London [p] and burgeſſes of Oxford could make wills of their land, as of a chattel, whether they had ſuch land by purchaſe or deſcent. In ſome places, this cuſtom was confined to land purchaſed [q].

A writ *de conſanguinitate.*

We have ſeen, that the aſſiſe of mortaunceſtor was limited within certain degrees, and lay only againſt certain perſons, on the death of certain perſons, beyond which recourſe was to be had to a writ of right. To prevent this, in queſtions of ſeiſin which could be proved *de proprio viſu et auditu*, there had lately been contrived, in aid of this aſſiſe, the writ *de conſanguinitate*, which was to determine queſtions of poſſeſſion in ſuch degrees and perſons to which the aſſiſe did not extend within the time of limitation preſcribed to the aſſiſe. This writ lay only of ſuch things as the deceaſed died ſeiſed of *in dominico ſuo, ut de fœdo*, and not thoſe he died ſeiſed of *ut de mero jure*; it being deſigned to go only upon the poſſeſſion, to avoid the hazard of the duel, and of the great aſſiſe. As this writ came in the place of the aſſiſe, and had for its object the ſeiſin of the anceſtor, there was every reaſon why it ſhould purſue the nature of its original, as nearly as poſſible. It therefore obſerved the time of limitation in the old writ, and was confined to the ſame perſons to which that was. Thus, though this writ exceeded the degrees of the aſſiſe,

[n] Bract. 278. b. [o] Vid. ant. 182. [p] *Barones Londin.* [q] Bract. 272.

as it extended to the grandfather, great-grandfather, and higher in the afcending line; and in the defcending, to the grandfon, great-grandfon, and lower; it, nevertheleſs, did not lie between ſuch perſons as the aſſiſe did not, as between co-heirs and the like; according to the rule, *inter quaſcunque perſonas locum habet aſſiſa infra ſuos limites, inter eaſdem locum habet conſanguinitas*; and *vice verſa* [r]. And if the time exceeded the limitation in a writ of *mortis anteceſſoris*, the writ of conſanguinity would not hold; as the demandant could not by poſſibility, at ſuch a length of time, prove the ſeiſin *de viſu et auditu proprio*, but only *alieno*, that is, of the father of the witneſs, who ſaw it, and enjoined the ſon to witneſs it thereafter; which ſort of teſtimony could only be received in a writ of right [s].

THIS was the origin and the nature of the writ *de conſanguinitate*; the form of which was as follows: *Præcipe A. quòd juſtè et ſine dilatione reddat B. terram, &c. cum pertinentiis in villâ, &c. de quâ C. conſanguineus* (or it might be expreſſed ſpecially, as *avus*, or *nepos*) *ipſius B. cujus hæres ipſe eſt, fuit ſeiſitus in dominico ſuo, ut de fœdo, die quo obiit, ut dicit. Et niſi fecerit, & B. fecerit te ſecurum, &c. tunc, &c. &c.* After the eſſoins, and both parties appeared in court, the demandant was to propound his *intentio* in this way: *B. petit verſus A. tantam terram cum pertinentiis in tali villâ, ut jus ſuum, et unde talis conſanguineus ſuus, cujus hæres ipſe eſt, fuit ſeiſitus in dominico ſuo, ut de fœdo, die quo obiit; et de ipſo tali deſcendit jus prædictæ terræ cuidam tali filio et hæredi:* and thus he was to deduce the deſcent, as in a writ of right, down to himſelf; and then add, *et quòd tale ſit jus ſuum, et quòd talis conſanguineus ita fuit ſeiſitus, offert, &c* he made an offer to prove: to which the tenant anſwered in this way: *Et A. venit, et defendit jus ſuum, &c. et dicit, quòd non debet ad hoc breve reſpondere, quòd, &c* [t]. which ſcrap of pleading may be noticed, as well

[r] Bract. 267. [s] Ibid. 281. [t] Ibid.

well for illuſtrating the action we are now upon, as to give the firſt inſtance that occurs of the formal parts of a record: many ſuch will preſent themſelves before we have done with this reign. It muſt be remembered, that Bracton ſays, this action was an aſſiſe, and might, like others, be occaſionally turned into a jury. All thoſe exceptions might be made to it, which lay in the aſſiſe of mortaunceſtor.

It is ſtated as a queſtion by Bracton, whether this writ could, by means of the *narratio*, or *counting* upon it, be turned into a writ of right, as a writ of entry might: as for inſtance, if the demandant in a writ *de conſanguinitate*, in counting his deſcent, *et unde talis conſanguineus ſuus obiit ſeiſitus in dominico ſuo, ut de fœdo*, ſhould then add, *et de jure;* this, Bracton ſays, would be going from the poſſeſſion to the *proprietas:* for in ſaying, *talis obiit ſeiſitus in dominico ſuo, ut de fœdo*, the *jus poſſeſſionis* only was brought in queſtion; and when he adds *de jure*, he brings likewiſe in judgment the *jus proprietatis*, which made the *jus duplicatum, or droit droit*[u]. But as the writ *de conſanguinitate* was, in its nature, only a poſſeſſory remedy, the demandant, by counting of the mere right, would go beyond the deſign of it; and therefore the writ would be deſtroyed, and the party have no remedy left but the writ of right. Again, by the ſame reaſon, a writ of right could not, by the way of counting, be turned into a writ *de conſanguinitate;* as a perſon who had once commenced a ſuit upon the right, with effect, could never go back to an action upon the poſſeſſion only. But a writ of entry, as it was *in jure proprietatis*, might ſometimes become a writ of right, on account of the entry being too ancient to be proved *proprio viſu et auditu:* and again, a writ of right might become a writ of entry, when the entry could be

[u] Vid. ant. 320.

proved

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proved *proprio visu et auditu.* But of this we shall have occasion to say more hereafter [x].

An assise of mortauncestor did not lie for a right of common, of the seisin of an ancestor; in lieu of it, therefore, a writ of *quòd permittat* had been formed: *Præcipe, &c. quòd, &c.* PERMITTAT *talem habere communiam pasturæ, &c. de quâ talis pater*, or *avunculus*, or *consanguineus, cujus hæres ipse est, fuit seisitus de fœdo tanquam pertinente, &c.* And in like manner for a successor: *Præcipe, &c. quòd, &c. permittat A. rectorem talis ecclesiæ, &c.* These two writs were possessory, as well as the former; and the mere right could not be discussed in them [y]. They were likewise always determined by a jury, and not in the way of an assise.

*Quòd permittat.*

There was a writ which partook of the nature of an assise of *mortis antecessoris* and of novel disseisin, to summon a person *ostendendum quo warranto se teneat in tantâ terrâ, &c. quam A. pater ipsius B. recuperavit versus eundem C. &c. et de quâ fuit seisitus ut de fœdo, die quo obiit, &c.* The like in case of a common [z].

It was not the practice to allow damages to be recovered in an assise of mortauncestor; which Bracton laments as an encouragement to chief lords to commit waste and destruction on lands which they seized at the juncture of a tenant's death. We have before seen, that a chief lord was more commonly an object of this assise than persons of any other description [a].

The next and last remaining assise was the *assisa utrùm*, to try whether a fee was lay or ecclesiastic. But before we enter upon this, let us turn back for a while, and review these assises, in the first mention of them by Glanville, and as they were now treated by Bracton. This proceeding was in Glanville's time called *recognitio*; and, in speaking of the

*Assisa utrùm.*

[x] Bract. 283. b. 284. [y] Ibid. 284 284. b. [z] Ibid. 285. [a] Vid. ant. 178.

remedies

remedies upon ſeiſin, he enumerates the recognitions then in uſe in the following way. There were, ſays he, the recognition *de morte anteceſſoris*; that, *de ultimâ præſentatione*; that, *utrūm aliquod tenementum ſit fœdum eccleſiaſticum vel laicum*; that, *utrùm aliquis fuerit ſeiſitus de aliquo libero tenemento die quâ obiit, ut de fœdo, vel ut de vadio*: that, *utrūm aliquis ſit infra ætatem vel plenam habuerit ætatem*; that, *utrūm aliquis obierit ſeiſitus de aliquo libero tenemento, ut de fœdo, vel ut de wardâ*; that, *utrūm aliquis præſentaverit ultimam perſonam ad eccleſiam, occaſione fœdi vel wardæ*. Theſe he ſpeaks of by name; and then adds, "and if any ſimilar queſtions (as many might) ariſe in court during the preſence of the parties, it was often awarded, as well by conſent of parties as by the advice of the court, to decide the controverſy by a recognition:" and then he mentions the recognition *de novâ diſſeiſinâ* [b].

THUS did Glanville conſider, not only all thoſe above ſpecified, but all poſſible recognitions had by conſent of parties upon the ſame footing, of the ſame nature, and attended with the ſame legal conſequences: as they were all *recognitions*, ſo were they all *aſſiſes*; thoſe terms being, at that time, convertible. We have before obſerved, that a recognition taken by conſent of parties was afterwards called a *jurata*, and that a diſtinction aroſe between an aſſiſe and a jury. In conſequence of this, many of the iſſues which in Glanville's time were tried by an *aſſiſe*, were now tried by a *jury*; and of all thoſe aſſiſes enumerated by him, there remained at the time of which we are writing, only that of *novel diſſeiſin*, *ultimæ præſentationis*, *mortis anteceſſoris*, and this *aſſiſa utrùm*. The firſt three of theſe ſurvived, no doubt, becauſe they were remedies by which property might be recovered, being attended with compulſory writs of execution and the like; and therefore, as they

[b] Glanv. lib. 13. c. 2. Vid. ant. 148.

were

were continued for the ſame purpoſes for which they were framed, they retained their original appellation, with their original uſe: while the others, being to try iſſues which were of little importance, except when connected with ſome principal queſtion of right, and which now might be tried by a jury, or by the aſſiſe in the cauſe turned into a jury, went out of practice as original aſſiſes, if indeed they ever had been ſuch. And it is to be wondered, how the *aſſiſa utrùm* eſcaped the ſame fate; having nothing in it like an original commencement of a ſuit, but ſeeming to be rather calculated for the trial of an incidental queſtion, not of importance except as it was involved in ſome other.

In later times, thoſe who wanted to account for theſe actions being denominated aſſiſes, have uſually ſaid that they were called ſo, becauſe the jurors were ſummoned in the firſt inſtance by the original writ; which did not happen in any other action. How far this might be, ſtrictly ſpeaking, a reaſon for the appellation, after what has here been ſaid of the hiſtory of aſſiſes and juries, the reader may form ſome judgment.

To return to the *aſſiſa utrùm*. This aſſiſe is ſaid by Bracton to have *multum poſſeſſionis et juris*, which is more than could be ſaid of any other, as it determined both the poſſeſſion and the right; for there could be no queſtion raiſed about the right after this aſſiſe, tho' the perſon who had *more* right might, notwithſtanding, conteſt his claim upon the *merum jus*. In this aſſiſe, recognition was to be made, whether the tenement in queſtion was the lay fee of the tenant, or was held *in liberâ eleemoſynâ*, belonging to ſome church. This aſſiſe, ſays Bracton, might be brought either by a layman or clerk; and ſo the practice had been eſtabliſhed in the time of the famous juſtice *Pateſhull*; tho' he afterwards himſelf altered his opinion, and held it would only lie in the perſon of a rector. But in the time of Bracton, they returned to the practice firſt eſtabliſhed by *Pateſhull*,

*ſpull*, and it was held good both for clergy and lay. This writ belonged only to rectors of pariſh-churches, and not to vicars.

THE writ in this aſſiſe was much the ſame as in Glanville's time; only it was returnable before the juſtices *ad primam aſſiſam*. In this aſſiſe, the tenant, whether clerk or lay, might vouch to warranty, as in the aſſiſe of *mortis anteceſſoris*. This aſſiſe would not lie of land given to cathedral and conventual churches, tho' given *in liberam puram, et perpetuam eleemoſynam*; the reaſon was, becauſe the gift was not to the church ſolely, but alſo to a perſon, to be held as a barony; as, *Deo et eccleſiæ tali, et priori, et monachis ibidem Deo ſervientibus*, or *epiſcopo tali, &c.*: and therefore ſuch perſons might have all thoſe remedies which laymen might, as writs of novel diſſeiſin, of entry, and of right; and conſequently were not to avail themſelves of a remedy deviſed merely for a parſon claiming land in right of his church, and who could claim no otherwiſe: for in caſes of parochial churches, gifts were conſidered not as made to the parſon, but to the church. This aſſiſe, like others, might be turned into a jury: and it may be noted here, that in all aſſiſes, when the aſſiſe paſſed *in modum aſſiſæ*, the entry on the roll was, *aſſiſa venit recognitura, &c.*; when *in modum juratæ*, the entry was conformably, *jurata venit recognitura, &c.*

IT may be obſerved, that, beſides this aſſiſe, a parſon might have many remedies to which laymen were entitled. He might have an aſſiſe of novel diſſeiſin, and a writ of entry; an aſſiſe of mortaunceſtor, from the nature of the parſon's eſtate, could not be brought by him. If a writ of right was brought againſt the parſon, he might, like another perſon, vouch to warranty, and then the ſuit would go on between the demandant and the warrantor to the duel, or the great aſſiſe. But if he had no warrantor, and had ſome one who could teſtify *de proprio viſu et auditu*, then,

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ſays Bracton, he might put himſelf upon a jury to try, *utrùm terra petita ſit libera eleemoſyna, &c. an laicum fœdum, &c.* as if a layman had originally brought the *aſſiſa utrùm*; which is a very happy and pointed inſtance of the remark we made before, concerning the iſſues, formerly triable by aſſiſes, being devolved on juries. If he choſe to defend himſelf by the duel, or great aſſiſe, for want of ſome witneſs *de proprio viſu et auditu*; he might do it from the neceſſity of the caſe, provided he had licence from the ordinary, and the concurrence of his patron. If land fell to his church by eſcheat, there was a writ for the rector to recover it: *Præcipe quòd, &c. reddat tali rectori, &c. quam clamat eſſe jus eccleſiæ, et quæ, &c. reverti debet, tanquam eſchæta.*

As this aſſiſe determined the right as well as the ſeiſin, it was made a queſtion by ſome, whether a conviction would lie againſt the jurors; and Bracton was clear, from ſome determinations in this reign, that it would, if the aſſiſe was taken *in modum aſſiſæ*, and if the writ of conviction was prayed before a long interval had paſſed from the taking of the aſſiſe. A conviction had been denied, where ſixteen years had elapſed [c].

Of conviction.

As we have gone through all the aſſiſes now in uſe, it follows, that ſomething ſhould be ſaid on the *conviction*, or *attaint*, as it was called in later times, for perjury; to which the recognitors were liable if they ſwore falſely. This is treated very ſhortly by Glanville, who only mentions the puniſhment; and from the paſſage where he ſpeaks of it, one might be led to think it belonged only to the great aſſiſe [d]. We ſhall find, that, on the contrary, tho' in Glanville's time it might lie in the great aſſiſe as well as others, yet now it lay in all others, but not in the great aſſiſe.

WHEN, therefore, the jurors in any of the foregoing aſſiſes had ſworn falſely, and ſo committed perjury, they

[c] Bract. from 285. b. to 288. [d] Vid. ant. 107.

might

might be convicted of that perjury by the perſon who had loſt by the aſſiſe. And that might be effected ſeveral ways; either by the oaths of twenty-four other jurors; or out of their own mouths by the examination of the judge, without recourſe to the jury of twenty-four; or by their own free confeſſion, in which they acknowledged their offence, and put themſelves on the king's mercy; and in theſe different caſes, the penalty was accordingly different.

If they were to be convicted by another jury, it was firſt to be ſeen, how many jurors were in the aſſiſe (for they were not always the ſame number); each juror was to have at leaſt two to convict him: and the jurors on the conviction were to be at leaſt of as good condition, if not better, than thoſe on the aſſiſe.

When it was in agitation to proceed to conviction in this manner, it was firſt to be conſidered who was in fault, whether the judge or the jurors; for which purpoſe the record was in the firſt place to be inſpected: for if the judge ſhould not have diligently made that examination which it was his duty to do, he himſelf might have negligently left occaſion of perjury to the jurors; and thus both would be in fault; perhaps it might lie with one of them only. By the record it would alſo appear, whether the aſſiſe was taken *in modum aſſiſæ*, or *in modum juratæ*. If in the former way, the jurors were to try whether the verdict was *true* or *falſe*: if it was true, then it remained in force; if falſe, the jurors were to be puniſhed for their falſe ſwearing. According to Bracton, a diſtinction was made between a verdict that was *falſum*, and one which was called *fatuum*: as for inſtance, if they gave their verdict generally, and it was not true, then it was what they properly called *falſum*; but if they gave a reaſon together with their verdict, and it was not true, this was called *veredictum fatuum*; being only a wrong concluſion of the jurors; and ſo rather a falſe reaſoning, than a falſe ſwearing. The judge might ſome-

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times go contrary to the verdict of the jurors, when they ſpoke the truth, and gave their reaſon for ſo doing. If, in ſuch caſe, he knowingly deviated therefrom, the fault lay with him.

If, upon view of the record, it appeared that the jurors, having declared themſelves obſcurely, had not been properly and diligently examined by him, or had anſwered his interrogatories not fully, or doubtfully; or ſeemed to have been miſled by ſome miſtake; or to have ſpoken the truth only in part; in ſuch caſes, the remedy was by *certificate*, and not by conviction; the certificate being a proceeding whoſe object was to render certain and true, that which was before dubious, erroneous, and uncertain: of this we ſhall ſay more hereafter.

In order to the conviction, as we before ſaid, it muſt firſt be ſeen whether the aſſiſe was taken *in modum aſſiſæ*, or *in modum juratæ*. When the complainant or demandant propounded his *intentio*, and maintained all the articles of the writ; and the tenant excepted to both, by denying them in part, or in the whole; the complainant was then to prove them by the aſſiſe: and as this was *in modum aſſiſæ*, a conviction would lie. But where the exception was of ſuch a kind, that, admitting both the matter of the writ, and the *intentio*, yet it deſtroyed the action, as a covenant, or the like; then the aſſiſe was taken, as has been often before mentioned, *in modum juratæ*, and the conviction would not lie. Yet if the aſſiſe was taken in the abſence of the tenant, and they found ſuch matter as would have been good ſubject of exception to the action; as a covenant for inſtance, or the like; then the aſſiſe being taken *in modum aſſiſæ*, a conviction would lie [e].

A conviction, as we before ſaid, lay in all aſſiſes, except the great aſſiſe; and the reaſon given by Bracton why it did not lie there, is, becauſe, when the tenant had the

[e] Bract. 288. b. 289, 290.

choice

choice between the duel and the aſſiſe, and he had voluntarily betaken himſelf to the latter, he ſhould not be allowed to reject their determination, any more than when a perſon had choſen to put himſelf on a jury[f]; and therefore a conviction which was with a view to overthrow and queſtion ſuch determination, was denied in both caſes. However, there was an exception in favour of the king; for when a jury had found any thing againſt the king, Bracton ſays, that there might, in ſome caſes, be a conviction. There was no conviction for damages, but the remedy in caſe of exceſſive damages was by *certificate*. The ſame perſons who brought an aſſiſe, or againſt whom it was brought, might have a conviction; and it was, in general, to be heard before the judge who tried the aſſiſe, he being beſt able to judge of the truth thereof[g]. The authority to take an aſſiſe was thought *eo nomine* to carry with it that of taking convictions and certificates, without which an aſſiſe might ſometimes not be completely taken; therefore it was, that a conviction was to be *ſtatim et recenter* after the caption of the aſſiſe; and it could not be had at a diſtance of time but by the ſpecial command of the king[h].

The writ of conviction was to the following effect: *Si A. fecerit, &c. tunc ſummoneas, &c.* 24 *legales milites de vicineto de villâ, &c. quòd ſint coram juſtitiariis noſtris ad primam aſſiſam, &c. recognoſcere ſi talis, &c. diſſeiſivit, &c.* as in the writ of aſſiſe; *unde A. queritur, quòd juratores aſſiſæ novæ diſſeiſinæ quæ inde ſummonita fuit & capta inter eos coram juſtitiariis noſtris ultimo itinerantibus in comitatu, &c. falſum fecerunt ſacramentum. Et interim diligenter inquiras, qui fuerunt juratores illius aſſiſæ, et eos habeas ad præf. aſſiſam coram præf. &c. Et ſummoneas B. quòd ſit, &c. auditurus illam recognitionem, &c*[i]. Nothing could be objected againſt this inquiry when the

[f] Vid. ant. 335. [g] Brad. 290. b. [h] Ibid. 291. [i] Ibid.

jury

jury appeared, they were ſworn, not as an aſſiſe, but as other juries: "Hear this, ye juſtices, that I will ſpeak of "that which you require of me, on the part of our lord "the king," &c. Then the judge proceeded to charge the jurors, as in other caſes. The entry upon the roll was thus: *Jurata viginti quatuor ad convincendum* 12 *venit recognitura, ſi A. injuſtè et ſine judicio, &c.* according to the form of the writ; and then the *narratio* followed: *Et unde talis queritur, quòd juratores talis aſſiſæ captæ coram juſtitiariis, &c. falſum inde fecerunt ſacramentum, eò quòd dixerunt quòd prædictus talis diſſeiſivit talem injuſtè, &c.* and ſo on through the *narratio* and *exception*, if any[k]. Upon this writ of conviction it may be remarked, as a reaſon why it ſhould not lie, when the aſſiſe was taken *in modum juratæ*, that the form of the original writ in the aſſiſe was ſo inſerted, as to confine the enquiry to the articles of that writ[l]; whereas the point tried by the aſſiſe *in modum juratæ* was, generally, ſomething collateral to the writ, which aroſe upon the pleading.

As theſe twenty-four could not be convicted if they ſpoke falſely, and as the conſequences of a conviction would be very penal to the twelve; great care was taken to examine the jurors diligently as to all the circumſtances upon which they meant to proceed. If there was a difference of opinion amongſt them, they might be afforced like the aſſiſe. If they were ſtill doubtful, or declared plainly that they knew nothing of the matter, things were left to remain as they were. If they confirmed what the twelve had done, the judgment was entered thus: *Conſideratum eſt, quòd* 12 *juratores bene juraverunt, et quòd tenens remaneat in ſeiſinâ, et querens cuſtodiatur*, to be redeemed by ſome heavy pecuniary penalty. If they found againſt them, the entry was, *Conſideratum eſt, quòd prædicti* 12 *juratores malè juraverint,*

[k] Bract. 292. [l] Ibid. 291. b.

*et*

*et quòd querens recuperet ſeiſinam ſuam, et ille tenens in miſericordiâ, et juratores* (if they were preſent) *cuſtodiantur*, if not *capiantur*. If the twelve had not been unanimous in their verdict, the twenty-four might convict thoſe who were on the wrong ſide, and acquit the others[l]. After the verdict of the twenty-four, there iſſued writs of execution, either to confirm the former ſeiſin, or to alter it[m].

THE puniſhment of the convicted jurors, though in ſubſtance the ſame, is more particularly ſtated by Bracton than by Glanville[n]. They were to be thrown into priſon; their lands and goods were to be taken into the king's hands, till they were ranſomed at the king's pleaſure; they were to be branded with perpetual infamy; to loſe the *legem terræ*, ſo as never more to be received as jurors (being, as they then called it, no longer *otheſworth*), nor witneſſes. A difference was made between the offence of jurors; for thoſe who ſwore *ſalvo viſu*, not having made it; thoſe who were added to the aſſiſe at the time of taking it, who could not poſſibly have made it; thoſe who, ſoon after the taking of the aſſiſe, had ſignified a wiſh to amend what they had done, and put themſelves on the king's mercy[o]; all ſuch were not to be branded with infamy, though they were to ſuffer the other part of the judgment.

THIS was the manner of proceeding, if there was no exception offered to the conviction. The exceptions that might be offered were many. One was, if the perſon who recovered in the aſſiſe had not had ſeiſin according to the verdict; another was, if the perſon ſerving the conviction had made a diſſeiſin of the identical land in queſtion. It ſeems, that a conviction was often proſecuted not out of any hopes of convicting the twelve, and recovering ſeiſin,

[l] Bract. 292. b.
[m] Ibid. 292. b. 293.
[n] Vid. ant. 131.
[o] Bract. 292. b.

but

but merely to extinguiſh, or at leaſt defer payment of, the *miſericordia* due in the aſſiſe [p].

Of certificates.

HAVING ſaid thus much of *convictions*, it remains to ſhew what was the nature of a *certificate*; which was the other method of re-conſidering the deciſion of the jurors in aſſiſe, and which was ſometimes an introduction to the former. The writ to ſummon jurors *ad certificandum* was of the following import: *Præcipimus tibi, quòd habeas coram juſtitiariis, &c. corpora A. B. C. &c. recognitorum novæ diſſeiſinæ ſummonitæ, et captæ coram, &c. ad* CERTIFICANDUM *præfatos juſtitiarios noſtros, &c. de ſacramento quod inde fecerunt. Et interim prædictum tenementum in manum noſtrum cape, &c. Præcipimus etiam quòd habeas, &c. corpus talis ad audiendum inde conſideracionem curiæ, &c.* A certificate was ſometimes had in order the better to underſtand the record in aſſiſe; and after that, it might be thought proper to reſort to a conviction. If the twenty-four were doubtful or obſcure in delivering their verdict, there might alſo, after all, be a certificate of their record [q]. A conviction might be brought by the heir, if the anceſtor died after the caption of the aſſiſe [r].

WE have before taken notice of the lenity ſhewn to ſuch jurors as wiſhed to amend the falſe verdict they had once given. This had the effect of taking off ſome of the conſequence of their perjury. To this it may be added, that the jurors, of right, might change their verdict before judgment was given; but afterwards, the only remedy was to proceed againſt them in a conviction [s].

Of different trials.

As we have now done with aſſiſes, and are proceeding to ſuch actions as were triable by jury, and otherwiſe; it may be proper, before we enter upon this part of our ſubject, to ſay a few words on the different trials now in uſe; which, though apparently very ſimilar, were ſo eſſentially diſtinguiſh-

[p] Bract. 292. b. [q] Ibid. 293. b. 294. [r] Ibid. [s] Ibid. 296.

ed,

ed, as to make it neceſſary to attend to each of them with accuracy.

It muſt be obſerved, that there were *aſſiſes*, of which enough has already been ſaid; *juries*; *inquiſitions*, or *enqueſts*; and *purgations*; as when a crime was imputed to any one, a purgation amounted to a proof of his innocence. Beſides theſe, ſays Bracton, there was a defence or denial oppoſed to a preſumption raiſed, which depended neither on a jury, nor an inquiſition, nor a purgation; but it was when a perſon averred ſomething, *et inde producit ſectam*; upon which there followed a defence *contra ſectam*, or a *quaſi*-proof oppoſed to the preſumption raiſed by the *ſecta*. Such defence againſt a *ſecta* was called a defence *per legem*; and conſiſted ſometimes of a greater number of perſons, and ſometimes of leſs, in different caſes. We have before ſeen the regulation which had been made by *Magna Charta* upon this head *. What was the nature of this *ſecta*, and of this defence or denial, with the inſtances in which they were both recurred to, will be ſeen more particularly in the ſequel †. For the preſent, let it ſuffice to ſay, that in all caſes of obligations, contracts, and ſtipulations, ariſing from the voluntary conſent and engagements of men, as in covenants, promiſes, gifts, ſales, and the like, where a *ſecta* was produced, which, upon examination, induced a preſumption only, he againſt whom the complaint was made, might defend himſelf *per legem*; that is, he might produce double the number of perſons which had been in the *ſecta*, to ſwear for him: for when they exceeded the *ſecta* in number, they induced a ſtronger preſumption; and the ſtronger preſumption always overbalanced the leſs. But if the complainant had a proof (for it muſt be obſerved, that the *ſecta* was only a preſumption, not a proof), as inſtruments and ſealed charters, there could be no defence *per legem* oppoſed to ſuch proofs. If, therefore, the

* Vid. ant. 248. † Bract. 290. b.

inſtrument

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inſtrument was denied, the credit of it was to be proved *per patriam, et per teſtes*; it being a common iſſue for a perſon to put himſelf *ſuper patriam, et teſtes in cartâ nominatos* [u]. Again, a perſon was not allowed this defence *per legem* in caſes of evident and notorious treſpaſs.

Dower *unde nihil.*

We ſhall now begin to ſpeak of ſuch actions as were triable in one or other of theſe ways. The action of dower *unde nihil habet*, and the writ *de recto* of dower, were the two remedies ſtill in uſe to recover dower, and ſeem to be conſidered by Bracton exactly in the ſame light in which they are placed by Glanville. The method of conducting them is more minutely deſcribed by Bracton, who alſo makes obſervations concerning them, which are well worthy of notice.

The writ *unde nihil* was ſaid to be brought in the king's court originally, and there only, becauſe, ſhould a queſtion ariſe, whether the demandant was lawfully married, no one could write to the biſhop to try the marriage, but the king or his juſtices. The writ *unde nihil* was at this time made returnable, ſometimes *coram juſtitiariis noſtris apud Weſtmonaſterium*; ſometimes *coram juſtitiariis noſtris ad primam aſſiſam, cùm in partes illas venerint* [x]. If the party ſummoned did not come at the appointed day, nor eſſoin himſelf, the land was taken into the king's hands, as in defaults in a writ of right; and if he eſſoined himſelf at the firſt day, and, another being appointed, he made default, then alſo his land was taken: ſo that, in both caſes, whether the default was before appearance or after, the woman recovered her dower by default, either by the *magnum cape* or *parvum cape* [y].

When the parties appeared in court, the widow was to propound her *intentio*, in perſon, or by attorney, to this effect: *Hoc vobis oſtendit B. quæ fuit uxor C. &c.* recit-

[u] Bract. 315. b.

[x] Ibid. 296. b.

[y] Ibid. The diſtinction between the *magnum* and *parvum cape* will be explained when we come to ſpeak more particularly of proceſs.

ing

ing her title to dower, in purſuance of the words of the writ, concluding it thus: *Et ſi hoc cognoſcere voluerit, hoc gratum erit ei; et ſi non, habet ſufficientem diſrationationem;* or, what was the ſame, and indeed the more common form, *et inde producit ſectam ſufficientem.* When the demandant had thus exhibited her *intentio*, the tenant might demand a view, by ſaying, *Peto viſum*; and after the eſſoins and delays attending that, he might vouch to warranty, or anſwer in perſon, as he pleaſed [z].

If the tenant had no exception to the writ, then he might, in the next place, call upon the demandant to produce her warrantor, as was the practice in Glanville's time; it being a rule, that no one ſhould anſwer a woman concerning her dower, unleſs ſhe brought her warrantor to ſhew what right he had to the other two parts; and again, that no woman ſhould anſwer without her warrantor. And therefore it ſhould ſeem, ſays Bracton, that as the ſon of a felon could have no right in the two parts, the widow of ſuch felon could not make out her claim to dower in the other third; nor could ſhe come upon the chief lord, who held it as an eſcheat, *pro defectu hæredis*; which was not the caſe where he took the eſcheat on account of the laſt poſſeſſor being a baſtard, and ſo not having any heirs, for then he came in, as to the purpoſe of dower, *loco hæredis*; and the widow could claim her dower againſt him. The ſame might be ſaid of an aſſignee of the fee, who being *in loco hæredis*, dower might be claimed againſt him [a].

After this the tenant might vouch *his* warrantor; and if he did ſo, and the warrantor did not appear to the writ of *ſum. ad warrant.* nor eſſoin himſelf, ſo much of his land was taken as was equivalent to the third part, by a *cape*: and if he did appear after this diſtreſs (for it was no more), the widow recovered her ſeiſin of that, and he had his remedy againſt the warrantor, whom he vouched [b].

[z] Bract. 297. [a] Ibid. 297. b. [b] Ibid. 299. b. 300.

If

If no warrantor was vouched, and the tenant meant to anſwer to the action himſelf, he might advance by way of exception to the action, ſuch matter as would entirely defeat the claim of dower. One great exception to this action was, that the demandant and deceaſed were not *legitimo matrimonio copulata*, or *ne unque accouples in loyal matrimonie*, as it was afterwards called. In this caſe, a writ iſſued to the biſhop, commanding him to try ſuch queſtion, as a matter properly belonging to his cognizance. Upon this, the biſhop ſummoned the tenant to appear, and then proceeded to hear the witneſſes produced by the widow and him; and ſo making an inquiſition in a ſummary way, he reported whether the marriage was lawful or not. When it appeared to the king or his juſtices, by the biſhop's letters, that the marriage was good, then there iſſued, at the inſtance of the demandant, a re-ſummons to the tenant[c]. If he made default, his land was taken by a *parvum cape*; to which if he made no appearance, ſeiſin of dower was adjudged to the demandant.

If the tenant admitted that the demandant was eſpouſed, but pleaded that ſhe was not endowed; or, that ſhe was eſpouſed and endowed, but not *ad oſtium eccleſiæ*; ſuch iſſues were to be tried in the king's court, and not in *foro eccleſiaſtico*; for it would have been as improper to tranſmit theſe to the eccleſiaſtical judge to be tried, as the ſpecial iſſue, whether a perſon born before marriage was legitimate. In this caſe, therefore, a writ of enquiry went to the ſheriff to make inquiſition of the fact *in pleno comitatu*[d]: for tho' the marriage was, in ſuch caſe, good, as far as concerned the legitimacy of the iſſue, it was not, ſo as to give title to dower[e].

Suppose all the above circumſtances were admitted, and the tenant ſaid that the dower was given in a different manner than ſtated in the *intentio* of the demandant; as that

[c] Bract. 302. 303. [d] Ibid. 303. b. [e] Ibid. 304.

it

it was not given in any particular land by name, but only the third part generally; how was this to be proved? In the firſt place, it became the widow to prove her *intentio*, and what ſhe had there averred, *per audientes et videntes*, who were preſent at the eſpouſals, and who were ready to confirm by oath what ſhe ſaid. If theſe were examined, and they agreed in what they ſaid, this proof was abided by, unleſs the tenant had ſome ſtronger evidence to prove the contrary. Suppoſe the widow had no proof, nor ſufficient *ſecta*, nor even an inſtrument to ſupport what ſhe had declared; then judgment was to be for the tenant, though he had neither proof nor preſumption for him, becauſe he was already in poſſeſſion: yet if the widow had a ſufficient *ſecta*, and the tenant only his own voice, he was not to be heard, though he was ready to put himſelf *ſuper patriam*, but the widow immediately recovered by force of the *ſecta*.

AGAIN, if the witneſſes (that is, the *ſecta*) were produced on both ſides, and thoſe on one ſide declared their ignorance of the matter, while the others maintained the point for which they were produced; judgment was given for that ſide, as the one where the truth of the matter lay. It was indiſpenſably neceſſary, that the widow ſhould produce a *ſecta*, or her demand would be totally void; and if the witneſſes produced proved nothing, or acknowledged that they were not preſent at the eſpouſals, or knew nothing of the dower or endowment, then the claim was loſt for want of proof, and judgment was for the tenant, *quòd quietus recedat*.

IF neither ſide had any proof, nor could raiſe a preſumption by a *ſecta*, and both, in the words of Bracton, *de veritate ponunt ſe* SUPER PATRIAM, *pro defectu ſectæ, vel alterius probationis, quam ad manum non habuerint*; then there iſſued

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issued a writ of *venire facias* to the sheriff in this form[f]: *tam ex ipsis, quam ex aliis de proximo vicineto, &c. venire facias coram justitiariis, &c. duodecim liberos, &c. ad recognoscendum, &c. si prædictus A. die quo ipsam B. desponsavit, dotavit eam nominatim de tali manerio, &c. vel si dotavit eam de tertiâ parte omnium terrarum, &c. ut idem D. dicit, quia tam prædicti B. quàm prædictus D. posuerunt se, &c*[g]. It may be here observed, that the issue, whether endowed *ad ostium ecclesiæ*, was tried on a writ of inquiry before the sheriff *in pleno comitatu*; but the issue, whether special or general endowment, was to be tried before the justices at Westminster; as was also the issue, whether endowed *ex assensu patris*, or not[h]. Again, the issues, whether the husband was so seised as to be able to endow[i], and whether the widow had received any part of her dower[k], were tried on a writ of inquiry before the sheriff. The reason of these distinctions is not easily discovered; and perhaps either of such writs were had at the election of the parties. The election of the parties seems to have directed not only in these cases, but also in the return of original writs, which, we have seen, were sometimes *coram justitiariis* at Westminster, and sometimes *ad primam assisam*, without any apparent reason for such a variety. They were sometimes made in the alternative, and were returnable at Westminster, NISI *justitiarii* PRIUS *venerint ad assisam, &c.*

In consequence of the statute of Merton[l], widows were to recover damages; and therefore, when they were to be put into possession, the writ of seisin had one of the following clauses inserted therein. After *seisinam habere facias*, they added, *et similiter ei sine dilatione habere facias tot marcas quæ ei in eâdem curiâ nostrâ adjudicatæ sunt pro dam-*

[f] Bract. 304.
[g] Ibid.
[h] Ibid. 305. b.
[i] Ibid. 309.
[k] Ibid. 312.
[l] Ch. 1. Vid. ant. 261.

*nis*

*nis ſuis, quæ habuit pro injuſtâ detentione, quam prædictus ei fecit de prædictâ terrâ, et dote ſuâ*; or in this way, *et de terris et catallis prædicti B. fieri facias tot denarios, et illos ſine dilatione haberi facias, &c.*

Writ of right of dower.

THUS far of the writ of dower *unde nihil, &c.* commonly called *the writ of dower.* If a perſon did not recover by this writ all ſhe was intitled to for dower, recourſe was then to be had to the writ of right of dower; which was a writ *cloſe*, as they called it, becauſe directed to the warrantor of the widow where the plea was to be heard; where it remained till that court was proved *de recto defeciſſe*; when it might be removed into the county court, and ſo to the ſuperior court, as other writs of right.

THE *intentio* upon this writ was different in the two caſes, of the widow having never been in ſeiſin of the land in queſtion, and of having been diſſeiſed by the tenant. The concluſion in the former caſe was, *et unde idem, &c. fuit ſeiſitus, &c. ita quòd me inde dotare potuit. Et ſi hoc vellet cognoſcere, &c.* as before in the writ of *unde nihil. Et ſi noluerit, habeo ſufficientem ſectam.* In the latter the concluſion was, *talis me injuſtè et ſine judicio diſſeiſivit, et quòd ita fui inde dotata, et ſeiſita habeo ſufficientem diſrationationem, videlicet, talem ſectam, et talem.* Thus this differed from the common writ of right, which concluded by offering to deraign the matter *per corpus talis hominis.* Indeed, it widely differed from that writ in both the above inſtances in which it was applied; a writ of right of dower was for the recovery of a life eſtate; and the latter form of it was grounded upon a diſſeiſin in the very words of the writ of novel diſſeiſin: and accordingly, in this action there was neither the great aſſiſe nor the duel, nor, conſequently, the eſſoin *de malo lecti*; all which were only in the proper writ of right.

WHEN the *intentio* was thus ſtated, and the tenant did not chuſe to call a warrantor, he might except to the action

in

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in various ways, and conclude his exception by *et inde producit sectam*, if he had any; and, if there was occasion, by *ponit se super patriam*; in which last case the truth would be enquired of by the country. When recourse was thus had to the country, in a plea depending in the county-court, by the tenant putting himself on the inquest, and the demandant so likewise, Bracton says, some might doubt, whether that court had power to proceed to take the inquest, without some special authority; but he thinks the sheriff had that and every other authority by force of the words in the original writ, *nisi*, &c. *hoc fecerit, tunc vicecomes hoc faciat*, &c. and as in other writs of right he might proceed to take the duel, and in writs of *justicies*, to try by jury, so he might take the inquest in this writ [m]. The reason of the above doubt does not seem easy to be accounted for.

In Glanville there is no mention of admeasurement of dower, but where the land all lay in one county. It had now become the practice, where the land lay in several counties, for the admeasurement to proceed in the king's court; and for all the lands to be extended and valued, as well the two-thirds as the third claimed in dower, and for such extent and valuation to be transmitted to the justices. Where the land lay only in one county, the old writ was directed to the sheriff; upon which there was the process of *cape*, in case of default; and the complainant stated his *intentio*, with an *inde producit sectam*; to which there were exceptions, and the matter was at length tried as in other actions [n].

Of Waste.

As a woman had not, what they called, the *proprietas*, but only the use and enjoyment of the land for her life, she was not to commit waste, destruction, or exile upon the freehold; and therefore, in taking such reasonable estover as was allowed her in the woods, for the purposes of building,

[m] Bract. 313. b. [n] Ibid. 314, 315.

firing,

firing, and inclosure, she was to be careful not to exceed such liberty: and if she did not listen to the remonstrance of the heir, or person who had right, there might issue a writ of *quòd non permittat* to the sheriff; being a sort of injunction, or prohibition, not to permit the widow *quòd faciat vastum de terris quas tenet in dote, &c. ad exhæredationem ipsius, &c.* And if she did not obey the injunction communicated to her by the sheriff, she was attached by a writ: *Pone per vadium et salvos plegios, &c. quòd sit coram nobis vel justitiariis nostris, &c. ostensura quare fecit vastum, &c. contra prohibitionem nostram, &c.* And if she did not appear at the day, the regular process of attachment would issue, with a permission, if she pleased, to have one essoin *de malo veniendi* after the first attachment; after which, and the appearance of both parties, the complainant stated his *intentio*, the same as in other actions. *Talis queritur, ut amicus talis, quòd cùm talis mulier teneat in villâ, &c. tantam terram nomine dotis, tale fecit vastum, et talem destructionem, &c. boscum et servos vendidit, gardinum extirpavit, &c. ad exhæredationem talis hæredis ad valentiam tanti, et inde producit sectam, &c.* This was the nature of the *intentio*. To this the widow might answer as follows: *Et talis mulier venit, et defendit vastum, venditionem, et exilium contra talem, et sectam suam: et quòd nihil inde vendidit, nec aliquid tale fecit ad exhæredationem talis hæredis, &c.* She might acknowledge, *quòd domus vetustate corruerit, &c.* and *si de bosco cepit aliquid, non cepit ibi nisi rationabile estoverium, &c.* and then conclude, *et quòd nihil amplius cepit, nec alio modo, ponit se super patriam:* for she could not defend herself *per legem*, says Bracton, because when an injury was done to any corporeal thing, which was manifest to the view of every body, a person was not permitted to deny it in that way, lest the oath of his *secta* might go to prove the contrary of that which was evident to every body's senses; and therefore he recommends, that in this action there should always be a

regular view; and then the damage alſo might be aſcertained with ſome exactneſs[o].

If a woman was convicted, by verdict, of making waſte and deſtruction in woods, the penalty to be inflicted on her was, that ſhe ſhould in future be ſo reſtrained, as not to be permitted to take even her reaſonable eſtover but by the view of the foreſters of the heir: and in ſome caſes, the court would appoint a foreſter; for which purpoſe a writ had been framed, and is to be ſeen in Bracton[p].

Waste might be committed, not only by a tenant in dower, but by a tenant for life, and by a guardian. If a tenant for life exceeded the meaſure preſcribed to a reaſonable eſtover, he went beyond what he was entitled to; and ſo far encroached upon the *proprietas*; and was, therefore, guilty of waſte, unleſs the waſte was too ſmall to be worth an inquiſition. Of what magnitude it ought to be, to become an object of judicial enquiry, depended, ſays Bracton, upon the cuſtom of particular places[q]. A guardian committing waſte was to loſe the cuſtody of the land*, to make amends in damages, and be *in miſericordiâ regis*; which was different from the penalty on a tenant in dower. In caſe of waſte by a guardian, they proceeded as before ſtated of waſte committed by a tenant in dower; by a writ of *quòd non permittat*; and after that by attachment[r].

Of theſe terms, *waſte*, *deſtruction* and *exile*, the two firſt ſignified the ſame thing; but *exilium* meant ſomething of a more enormous nature; as ſpoiling the capital meſſuage; proſtrating or felling houſes; proſtrating and extirpating trees in an orchard, or avenue, or about any houſe: all theſe were conſidered, ſays Bracton, *ad maximam deformitatem*; and as they either drove the inhabitants away, or had a tendency ſo to do, they were called *exilium*[s].

[o] Bract. 315. b. 316.
[p] Ibid.
[q] Ibid. 316. b.
* Vid. ant. 236.
[r] Bract. 317.
[s] Ibid. 316. b.

If

If the heir aliened the two-thirds of the land, and attorned the ſervice of the dowreſs; and if he afterwards, on the death of the tenant in dower, intruded himſelf, or if any ſtranger did ſo, the vendee might have a writ of entry, grounded upon ſuch intruſion[u].

Of writs of entry.

We ſhall now treat more fully of writs of entry, which have been ſo often alluded to in the foregoing pages. As queſtions of poſſeſſion were determined by aſſiſes and recognitions, queſtions *de proprietate* were decided, ſays Bracton, in writs of entry by *a jury*, upon the teſtimony and proof of thoſe who could prove the caſe *de viſu ſuo proprio et auditu*. This was, where any one claimed his own proper ſeiſin, or that of his anceſtor, which ſeiſin he had demiſed to ſome one for term of years, or for life, and which, of courſe, after that term, ſhould revert to him; in which caſe, he could not have an aſſiſe of novel diſſeiſin to recover it, becauſe he had not ſuffered a diſſeiſin; nor an aſſiſe of mortaunceſtor, becauſe, if the term had been for life, the anceſtor could not be ſaid to have died ſeiſed in his demeſne as of fee, while another had the freehold; tho' indeed he might, if the term had only been for years.

And this action lay not only againſt the perſon himſelf who had the term, but againſt all thoſe who had an entry within the *degrees* and the *time* limited to this action. This action was allowed within the third *degree* of kindred, and within ſuch *time* as could be teſtified *de proprio viſu et auditu*. It held not only in the above caſe, but where a perſon had his entry *per alium*, who was ſeiſed in right of ſome other, and ſo aliened; as where a canon aliened without aſſent of the chapter, a wife without aſſent of her huſband, a huſband without aſſent of his wife, and the like; it held alſo againſt thoſe who gained their entry thro' the medium of a guardian, or bailiff only, who had no right to alien.

[u] Bract. 317. b.

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THE moſt general form of a writ of entry was that which ſuppoſed the perſon againſt whom it was brought, to have holden the land *ad terminum qui præteriit*: upon which writ there might be a *narratio*, containing ſuch ſpecial matter as conſtituted the merits of the caſe. The following was the form of this writ: *Præcipe A. quòd juſtè et ſine dilatione reddat B. tantùm terræ cum pertinentiis in villâ, &c. quod idem B. ei dimiſit* AD TERMINUM QUI PRÆTERIIT, *ut dicit*; *et niſi fecerit, et B. fecerit te ſecurum de clamore ſuo proſequendo, tunc ſum. per bon. ſum. præf. A. quòd ſit coram juſtitiariis noſtris ad primam aſſiſam cùm in partes illas venerint, oſtenſurus quare non fecerit, &c*[x].

THE proceſs upon this writ was the ſame as on a writ of right; except that the tenant who might have the eſſoin *de malo veniendi*, could not have that *de malo lecti*, unleſs the writ of entry was turned into a writ of right by the *narratio*, or counting upon it, *propter longiſſimum ingreſſum*, on account of ſuch a length of entry as could not be proved *viſu proprio et auditu*, but only by that of ſome one elſe. If it was reaſonable that when this writ of entry became a writ of right, it ſhould have all the conſequences attending that writ, whoſe nature it had aſſumed by the manner of counting; ſo likewiſe, on the other hand, when a writ of right was turned into a writ of entry, as happened not unfrequently, it intirely ceaſed to be a writ of right in all reſpects, and there was no longer therein the eſſoin *de malo lecti*[y].

BEFORE more is ſaid concerning the change of a writ of entry into a writ of right, and of a writ of right into a writ of entry, the reader muſt recollect, that the writ of entry has already been ſpoken of as an invention ſince the time of Glanville; and was contrived, no doubt, to avoid the neceſſity of recurring to the duel and great aſſiſe, whoſe determination could never afterwards be re-conſidered. Thus this new writ was framed in the nature of that for

[x] Bract. 317. b. 318. [y] Ibid. 318.

which

which it was to be an occasional substitute; and so great an affinity was still discernible between them, that we see, in these and many other instances they were convertible, that is, either of them might become the other to all intents and purposes. How that was effected, will be rendered clearer by a few instances.

When it was attempted to convert a writ of right into a writ of entry by the counting, and the demandant said, that he was ready to prove it by a jury; yet it was in the election of the tenant, whether he would put himself upon the jury to try the entry, because he had three remedies: for he might either defend himself by the duel, or put himself upon the great assise to try the right, or upon a jury to try the entry. Thus, as it was at the option of the tenant to chuse which of these he pleased, the writ of right was not changed into a writ of entry (notwithstanding the counting), till the tenant had chosen to put himself on a jury to try the entry; as for instance, if a writ of right was brought containing the words necessary to include the *jus merum*; and then there was added this clause: *Et in quam non habet* INGRESSUM *nisi per talem anteceſſorem ſuum, qui terram illam ei dimiſit ad certum terminum, &c.* though these were words perfectly proper to bring in question the entry, and though it was within the time to prove it *proprio viſu et auditu*; yet a writ of right would not, by so doing, become a writ of entry, but would continue as it was, unless the tenant voluntarily put himself upon a jury to try the entry [z].

A writ of entry was sometimes changed into a writ of right, not by choice, as in the above-mentioned change, but through necessity; either *propter longiſſimum* INGRESSUM, the great distance of time at which the entry was alledged, or *propter donum et feoffamentum*. That was called *longiſ-*

[z] Bract. 318 b.

*simus*

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*finus ingreſſus*, which could not be proved *proprio viſu et auditu*, but was obliged to be proved by tradition; as *de viſu et auditu patris*, who enjoined his ſon to give teſtimony thereof: in which caſe, out of neceſſity, from the want of proof, the tenant was forced to put himſelf upon the great aſſiſe, or defend himſelf by duel. Thus, ſuppoſe an entry was laid ſo far back as the time of Henry II. or later, yet ſo as not to be within the limitation of a writ of mortaunceſtor; as ſuppoſe thus: *Et unde A. non habet ingreſſum niſi per B. qui non niſi cuſtodiam inde habuit, &c.* and then was added, *et unde prædictus, &c. fuit ſeiſitus in dominico ſuo, et de fœdo, et jure tempore talis regis capiendo inde expletia, &c. et de tali deſcendit jus, &c.* as in a writ of right; in this caſe, the tenant was obliged to put himſelf upon the great aſſiſe, or defend himſelf by duel, for want of other proof: but, would the diſtance of time allow it, he might, if he choſe, have put himſelf upon a jury to try the entry [a].

THUS far for the change *propter longiſſimum ingreſſum*, or the antiquity of the entry. The other, *propter donum et feoffamentum*, was, where a feoffment was oppoſed to the entry, which might be ſtated in this manner by the tenant: *Defendit talem ingreſſum, et dicit, quòd habuit ingreſſum per anteceſſorem illum (de cujus ſeiſinâ idem Petrus petiit terram illam) qui de terrâ illâ feoffavit eum tenendum pro homagio et ſervitio ſuo, et quòd tale fuit jus ſuum per feoffamentum et non per talem ingreſſum ponit ſe in magnam aſſiſam*; upon which the aſſiſe proceeded to try the iſſue, whether the tenant had more right to hold the land for the homage and ſervice by reaſon of the feoffment, or the demandant to hold it in demeſne [b].

To return from this digreſſion upon the reciprocal changes of writs of entry and writs of right; and to go on with the manner of proceeding in a writ of entry. The

[a] Brac. 318. b. [b] Ibid. 319.

proceſs,

proceſs, as was before ſaid, was the ſame as in the writ of right, and therefore need not be particularly noticed in this place. When both parties appeared, the demandant was to begin by ſtating his *intentio*. If he was only a tenant for life, he was to claim the land, *ut jus meum poſſeſſorium*; if in fee, *ut hæreditatem*; and then go on, *in quam talis non habet ingreſſum niſi per talem, &c.* To this the tenant might anſwer by denying the right of the demandant *per talem*, and ſay, that he had not an entry *per talem* mentioned in the writ, but *per alium talem*; and of that he might put himſelf upon an inqueſt. It appears from Bracton, that this inqueſt might be taken before the ſheriff, and the *cuſtodes placitorum coronæ in pleno comitatû*, and then there iſſued a writ of inquiry to the ſheriff; or it might be, *coram nobis*, or *coram juſtitiariis noſtris apud Weſtmonaſterium*: and in that caſe, there was a writ of *venire facias*, as it is ſince called [c]. Whether this matter was to be tried before the ſheriff, or before the juſtices, depended probably upon the return of the original writ, which we have ſeen had ſometimes the one, and ſometimes the other return; or it might perhaps be at the option of the party to chuſe the ſheriff; or the juſtices might reſerve only ſuch queſtions as were thought to be of great difficulty, to be tried at the bar of the court: but that in a *commune placitum* the jurors ſhould be ſummoned to try ſuch an iſſue *coram nobis*, ſeems very particular, and not eaſily to be accounted for [d]. When a *præcipe* was returnable before the juſtices aſſigned, the iſſue was, moſt probably, tried before them alſo; and probably it reſted merely on the option of the demandant, whether the original writ ſhould have the one or the other return. It was not unuſual to cauſe a jury, which had been ſummoned before the juſtices aſſigned, to be removed into the ſuperior court at Weſtminſter;

[c] Bract. 319. a. b.

[d] V. d. ant. 244. Magna Charta.

for

for which purpoſe there iſſued a ſpecial *venire facias*; and if the jurors made default, a *habeas corpora recognitorum*, which had ſometimes a clauſe directing the ſheriff to fill up what vacancies had happened among the jury by death or otherwiſe[e].

We have above ſuppoſed that the iſſue went to a jury to be tried; but before this, it was neceſſary that both parties ſhould take ſuch ſteps to prove, or raiſe a preſumption in ſupport of their allegations, as was required in other actions determinable by jury. The *intentio* was not in this, any more than in other actions, to be taken on the *ſimplex loquela*[f] of the demandant: he muſt produce proof, if he could; or, if he could not, he muſt raiſe a preſumption by a *ſecta*, which was open for the other ſide to defend *per legem*. If the demandant had neither, the tenant had no need to anſwer the action at all, and the writ was loſt; unleſs, ſays Bracton, as ſome thought, he might, and ought *de gratiâ juſtitiariorum*, to be aſſiſted by a jury of the country. But this was to be only upon ſome good cauſe being ſhewn: either that the inſtruments on which he relied for proof of the matter, were loſt; or that he had them not at hand, or could not get them without difficulty, to make uſe of on that occaſion. In ſuch caſes, it ſeems, the court would direct the matter to be tried by a jury; and another day would accordingly be given to the parties[g].

If the parties did not go to iſſue in the above way, it was becauſe the tenant choſe to except to the action. The exceptions he might make were many: he might ſay, that ſome one elſe had more right than the demandant; that another made the demiſe, and not the perſon named in the writ; that the term was not expired; or, if it was expired as far as limited by one inſtrument, that it had been enlarged by another, which he then exhibited; that the time exceeded the limitation in a writ of mortauncestor, and therefore

[e] Bract. 325. b. 326. [f] Vid. ant. 248. [g] Bract. 320.

the

the proof would be defective. These and numberless other exceptions might be taken[h]. The tenant might vouch to warranty the person *per quem* he had his entry, and that warrantor might vouch another; and so on, to the fourth degree, but not beyond.

THE writ of entry lay properly only against a freeholder; that is, one who had an estate for life, or in fee, or in fee-farm, and such only was considered as properly tenant. However, in truth, says Bracton, if this writ was brought against a farmer, it would not fail, for he might call his warrantor; and if he defended him, the farmer would retain his usufruct: if not, he might have his resort to the warrantor, as far as his usufructuary interest went; and the warrantor over against his warrantor, as far as his freehold interest was concerned. Notwithstanding what Bracton here says concerning a farmer, he afterwards lays it down most positively, in conformity with what was said above, that a writ of entry would not lie against one who held for a term of years, because he did not hold the freehold in demesne, but only the usufruct; and much less would it lie against a tenant from year to year[i].

Different kinds thereof.

THE writ of entry *ad terminum qui præteriit*, which we have hitherto been speaking of, lay for that person who had himself made the demise: when it was brought by the heir of the demisor, it was altered accordingly; as, *in quod, &c. non habet ingressum nisi per talem, cui talis pater*, or, whoever the ancestor might be, *illud dimisit ad terminum qui præteriit, &c*[k].

THUS were writs of entry varied according to the circumstances of the case upon which they were founded; and some of them received appellations from the effective words in the writ. One was afterwards called a *cui in vitâ*; which was brought by a widow when her husband had made a gift of her inheritance. This writ was in the

[h] Bract. 320. b. [i] Ibid. 321. Vid. ant. 302 303. [k] Bract. 321.

following

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following form: *Præcipe, &c. quòd, &c. reddat tali quæ fuit uxor talis, &c. quam clamat esse jus & hæreditatem suam; & in quam prædictus talis non habet ingressum nisi per pred. quondam virum suum, qui illud ei dimisit,* CUI IPSA IN VITA SUA CONTRADICERE *non potuit, &c.*[l]. The usual answer to this action was, that the wife appeared on such a day personally in the king's court, and there, of her free will and consent, granted and confirmed the gift made by the husband; for proof of which the record thereof was to be inspected, where there ought to be special mention made that the woman consented: upon such consent, says Bracton, a chirographum was made, which, together with the record, was now vouched; for it was a rule, that the record without a chirographum would not bar the widow's action. In other words, this was a plea of a fine. If a gift by the husband was what they called *voluntary*, it was not valid without the above circumstance of the woman's consent signified in court; but if the gift had been made, as they called it, *in causâ honestâ et necessariâ*, as to a son, or with a daughter in marriage, then it was binding upon the wife without these solemnities[m].

AGAIN, in case of a voluntary alienation of the wife's land by the husband, if she died before him, then the son who was her heir might have a writ of entry in the following words: *In quam non habet ingressum nisi per talem virum ipsius talis, cujus hæres ipse est, qui illam ei vendidit in vitâ suâ, cui prædicta talis in vitâ suâ contradicere non potuit, &c*[n]. If a second husband aliened the wife's dower by her first husband, she might, after his death, have a writ of entry, *quam clamat esse rationabilem, &c. et in quam prædictus talis non habet ingressum nisi per talem*, her second husband, *qui illud ei dimisit, cui ipsa in vitâ suâ contradicere non potuit, &c.* and the heir of her first husband,

[l] Bract. 321. b. [m] Ibid. 321. b. 322. [n] Bract. 322.

in

in caſe ſhe died before her ſecond huſband, might have a writ of entry applicable to the nature of his claim, whether the ſecond huſband held himſelf in ſeiſin, or the wife had aliened: *In quam non habet ingreſſum niſi per talem, qui illud ei dimiſit, et qui illud tenuit in dotem talis uxoris, &c.* or, *niſi per talem, quæ fuit uxor talis, quæ illud tenuit in dotem, &c*[o].

THE caſes in which a writ of entry was the proper remedy, were very numerous. We ſhall enumerate ſome of them. If an abbot, prior, or biſhop, demiſed without aſſent of the chapter, or the chapter without aſſent of thoſe whoſe aſſent was required by law; then there was a writ, *non habet ingreſſum, niſi per talem quondam abbatem, &c. qui illud ei dimiſit* SINE ASSENSU CAPITULI[p], and the like. The writ here mentioned, was called a writ of entry *ſine aſſenſu capituli.* So if a wife demiſed without aſſent of her huſband, *non habet ingreſſum niſi per præd. talem mulierem, quæ illud ei dimiſit ſine aſſenſu et voluntate prædicti talis quondam viri ſui, &c.* So if a bailiff demiſed without the conſent of his lord. If a tenant was convicted of felony, the lord might have a writ to recover his eſcheat: *Non habet ingreſſum niſi per C. de N. qui eam* TENUIT, *&c.* ET QUÆ, *&c.* ESSE *debet* ESCHÆTA *propter feloniam de quâ idem C. &c. convictus fuit et damnatus, et quam terram idem C. dimiſit, &c.* which was called a writ of *eſcheat.* Again, if any one had his entry by one who held in villenage; by one who was *non compos ſui nec ſanæ mentis*; by one who held only for life, whether in dower, or *per legem terræ*; the remedy was by writ of entry. In caſes of a writ brought by the reverſioner after an eſtate for life, the writ, after *ut dicit*, always had theſe words: *unde queritur*, QUOD *ipſe talis injuſtè* EI DEFORCEAT, *&c*[q]. from which words the writ was afterwards named *quod ei deforceat.*

[o] Bract. 323. [p] Ibid. 322. [q] Ibid. 323. b.

A WRIT

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A WRIT of entry lay, if any one intruded into the inheritance; *non habet ingreſſum niſi per hoc, quòd ipſe ſe intruſit, &c.* If a man aliened land of which he had the cuſtody: *non habet ingreſſum niſi per C. qui non niſi cuſtodiam inde habuit, &c.* with ſome ſmall difference in the words when the heir claimed of his own ſeiſin, and when of his anceſtors; *dum idem B. fuit infra ætatem in cuſtodiâ, &c.* It lay when a common of paſture was demiſed; *non habet ingreſſum niſi per C. (cujus hæres idem B. eſt) qui paſturam illam ei dimiſit, ad terminum qui præteriit, &c.* But it only lay of a common in certain[r]. Theſe, in addition to ſuch writs as have been mentioned in the former part of this chapter, are all the writs of entry to be found in Bracton. Theſe are applicable to very many caſes of ouſter of freehold; and from the general conception of *ad terminum qui præteriit*, and the infinitude of circumſtances and ſituations which might be included within thoſe general words, it was poſſible to make this remedy much more univerſal.

WE have before examined whether a writ of entry would lie *againſt* a farmer, or tenant for a term of years[s]. We ſhall now ſee whether it would lie *for* perſons of that deſcription. It is ſaid by Bracton, that a farmer who had demiſed *ad terminum qui præteriit*, might demand his own ſeiſin, tho' he had no right in the freehold; for he had a poſſeſſory right of ſome kind or other; and therefore, according to our author, was intitled to an action grounded upon his own demiſe, and his own act. A writ of entry, however, brought by one who held for a term of years, or for life, could never be turned into a writ of right; it being a rule, that an action upon the poſſeſſion, merely, ſhould never be turned into an action upon the right, nor *è converſo*[t].

NOTWITHSTANDING what was before ſaid, of a writ of entry being limited to the time to which a writ of mort-

[r] Bract. 324. 324. b. [s] Vid. ant. 393. [t] Bract. 326. a. b.

aunceſtor

aunceſtor was confined, there was a caſe, where, of neceſſity, and becauſe no other action could be had, this writ would lie beyond that period: as where one who held only for life, demiſed for a very long term, which exceeded the period of a writ of mortaunceſtor; and then as he had not ſuch an intereſt as would entitle him to a writ to try the mere right, he was allowed to try the entry by a jury; as alſo was a tenant in fee, in the like circumſtances, who could not count *de uſu et expletiis*, which was always neceſſary in a writ of right [u].

ANOTHER limitation of this action was the degrees within which it was confined. It never was allowed beyond three degrees; which were reckoned in this way. If the writ was of the kind we mentioned firſt, *ad terminum qui præteriit*, on the demandant's own demiſe, this was one degree. If the tenant was ſaid to have his entry *per* ſuch a one, that conſtituted two degrees. If the entry was PER ſuch a one, CUI the land in queſtion was demiſed by ſome anceſtor of the demandant, this was in the third degree [x]. A writ of entry was not allowed beyond this, and the party muſt, in caſe his demiſe was further removed, have recourſe to a writ of right. It is ſtated by Bracton as a queſtion, whether the paſſing of land from an abbot to his ſucceſſor was counted as a degree, in like manner as from one heir to another; and he thought not: for though the perſon was changed, yet the dignity and capacity, which was the principal conſideration, remained the ſame [y].

[u] Bract. 326. b.
[x] Fleta, 360.
[y] Bract. 321.

CHAP.

## CHAP. VII.

## HENRY III.

*Writ of Right in the Lord's Court—Proceſs in Real Actions—Summons—Of Eſſoins—De Malo Lecti—Defaults—Magnum Cape—Warrant de Servitio Regis—Parvum Cape—Writ of Quo Warranto—The Count—Tender of the Demi-Mark—Defence—Of granting a View—Vouching to Warranty—Nature of Warranty—Proof of Charters—Warrantia Chartæ—Of Pleading—Of Prohibitions—Attachment ſur Prohibition—Of Juriſdiction—Abatement of the Writ—Pleas to the Perſon—Of Baſtardy—Writ to the Ordinary—Of Minority—Excommunication—Parceners—Pleas to the Action—Non Tenure—Majus Jus—Releaſe—Fine and Non Claim—Of Perſonal Actions—Attachment—Execution of the Writ.*

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HAVING gone through aſſiſes and recognitions, which went upon a poſſeſſory right, to recover a man's own ſeiſin, or that of his anceſtor; and alſo ſuits upon an entry; it remains only to ſpeak of an action for the recovery of a right and property grounded either upon a man's own ſeiſin, or that of his anceſtor who did not die thereof ſeiſed; in which action, both the right of poſſeſſion and the right of property were determinable; and after judgment therein, either upon the aſſiſe or duel, no recourſe could be had to any other remedy; the judgment being, that the demandant ſhould recover ſeiſin to him and his heirs quietly, as againſt the tenant and his heirs for ever [z].

[z] Bract. 327. b. 328.

THE

THE writ of right and the proceedings thereon are treated more fully by Glanville than any other action; but this, as well as other branches of learning, had made great advances in improvement since the time of that writer: these are stated very minutely in the great authority by which we are so much assisted in our enquiries during this reign; and we should not fulfil our duty to the reader, if we withheld such further information as can be derived from that source, on so important an article as the proceeding in a writ of right. Should the reader be a little retarded by sometimes recurring to what has been before said on the same subject, it is to be hoped, that, on this, as on other occasions, his patience will be rewarded by the new lights which he will thence receive, to guide him in the future progress of this History.

Writ of right in the lord's court.

THE writ of right to the lord's court underwent no change in its form and language, tho' that in the king's court had some few words inserted which were not in it in Glanville's time. The words which mention the land to be held of the king *in capite* were probably added in consequence of the provision of *Magna Charta* about *præcipes in capite*, with design to shew that the present was a proper subject for the king's court, and not within the prohibition of that act[a]. The writ ran thus: *Præcipe*, &c. *quòd*, &c. *reddat*, &c. *tantum terræ, quod clamat esse jus et hæreditatem suam, et tenere de nobis in capite; et unde queritur, quòd*, &c. and so on, as in the old writ; only the return was *coram justitiariis nostris apud Westmonasterium*[b].

SINCE the provision of *Magna Charta* about *præcipes in capite*, writs of right were, of course, more generally brought in the lord's court, and from thence were removed to the county, and sometimes to the superior court. The removal to the county was allowed only when the lord was proved *de recto defeciſſe*. Many were the occasions when

[a] Vid. ant. 270.

[b] Bract. 328. b.

this

this failure of juſtice might be ſaid to happen; as when the deforceant claimed to hold of a different lord from the demandant; when the real lord had no court, or refuſed to hear the cauſe, or no one was in court to hear it; in which caſes, recourſe could not be had to the chief ſuperior lord, becauſe the writ directed particularly, *ſi, &c. non fecerit*, VICECOMES *hoc faciat*. Again, if a perſon who lived out of the lord's juriſdiction was called to warranty; if the deforceant eſſoined himſelf *de malo lecti* out of the limits of his juriſdiction, where the four knights could not make the view; if the tenant put himſelf on the great aſſiſe; all theſe, and an infinitude of other matters, were cauſes of removal, as producing a failure of juſtice. The method of proceeding in the lord's court was different in different places; only in praying a view, vouching to warranty, and ſometimes in pleading, in waging duel, and in ſome other matters, the courſe of the king's court was obſerved [c].

WHEN the officer, or ſerjeant ſent by the ſheriff, had atteſted in the county court, that there was a failure of juſtice in the lord's court (and the officer's report in this point was a record), then the demandant prayed the judgment of the court thereon; and accordingly the tenant was commanded to be ſummoned to anſwer at the next county court; at which time they might either appear, or eſſoin themſelves. If the demandant appeared, but the tenant did not, then, upon the ſummoner atteſting the ſummons, he was proceeded againſt for the default, according to the cuſtom of different counties, either by caption of the land into the king's hands, or otherwiſe. The cuſtom in the county of Lancaſter, which is ſaid to have been approved by the famous Pateſhull, was this: the tenant was ſummoned twice, and if he did not then appear, and the ſummons was proved, the judgment of the court was, *quòd capiatur*

[c] Bract. 329. b.

*parvum*

*parvum nampium* on the land, in name of a diſtreſs, and the tenant was ſummoned a third time to appear at the third county; if he did not then come, the judgment was, *quòd capiatur magnum nampium*, that is, the *averia* and chattels, double the firſt, by way of afforcing the diſtreſs, and he was ſummoned a fourth time; when, if he did not come, there was a *capiatur terra* into the king's hands, and a fifth ſummons; and if he appeared not, nor replevied the land, the demandant had judgment to recover ſeiſin by default [c]. From this ſpecimen of the practice in the county of Lancaſter, we are left to conjecture what was the nature of that in other counties.

WHILE the ſuit was in the county court, if a perſon was vouched to warranty, that court could not ſummon the warrantor, but recourſe was had to the king's writ *de warrantiâ*, which commanded the perſon to warrant the land in queſtion in the county; *et niſi fecerit, quòd ſit in adventu juſtitiariorum, &c.*: ſo that, if the warrantor did not enter into the warranty in the county, day was given to all the parties before the juſtices *in itinere*, where the plea of warranty was determined, and then the principal ſuit was remanded back to the county court, if the juſtices ſo pleaſed; though, that, as well as the warranty, might, *de gratiâ*, if they pleaſed, be determined before them without any writ of *pone* [d].

IF the tenant put himſelf upon the great aſſiſe, a day was given to the next county: and, in the mean time, he applied for a writ of peace till the coming of the juſtices at the next aſſiſe; which writ he was to obtain in perſon, becauſe he was to make oath that he was tenant, and had put himſelf on the aſſiſe. The writ of peace, the prohibition to the ſheriff, that for ſummoning the knights, and the aſſiſe, were much the ſame as in Glanville's time, both in the words and the practice of them; only the jurors were to appear *coram juſtitiariis ad primam aſſiſam, &c.* [e].

[c] Bract. 330. [d] Ibid. 331. [e] Ibid. 331, 331. b. 332.

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SHOULD a suit be removed by *pone* from the sheriff's court to the court above, in the interval, before the warrantor appeared before the justices itinerant, there was, however, no mention of the warranty in the writ of *pone*; but after the usual essoins and delays, the demandant counted afresh, from the day on which the vouching was in the county; and so the tenant was obliged to vouch again, and the day appointed before the justices itinerant became void [f].

A WRIT of *pone* was rarely granted on the prayer of the tenant, except for some special reason, which was to be expressed in the writ; as thus: *Pone ad petitionem tenentis eò quòd agit in partibus transmarinis, &c. loquelam, quæ est, &c.* If the tenant could not appear; if the demandant was related to, or a servant or friend to, the sheriff; if he was very powerful in the county, or was sheriff himself; all these were causes sufficient to entitle the tenant to remove the suit. There were some cases in which the demandant was obliged to remove the suit, on account of the privilege of the tenant; as where he was a Templar or Hospitaller, or of any other description of persons who had the privilege of answering to no suit, except *coram rege, vel ejus capitali justitiario.* There were cases of necessity, in which also the suit was to be removed; as where bastardy or any thing else was objected, which the county could not legally decide or try [g].

IN the same manner were suits removed from the county and court baron to the justices *in itinere.* There was also another cause of removal from the county court. This was on account of a false judgment; in which case, likewise, the removal was by *pone* [h].

WHEN the suit was thus removed by *pone*, the tenant was to be summoned to appear. The summons of the tenant is treated of by Glanville. Some few things may

[f] Bract. 332. [g] Ibid. [h] Ibid.

be

be added to render his account more satisfactory, as well as to give a comparative view of proceſs in general, whether in actions real, perſonal, or mixed.

Proceſs in real actions.

THE moſt common proceſs in uſe was the ſummons; and after that, in ſome caſes, there followed either a caption into the king's hands for default, or an attachment, according to the nature of the action. Another proceſs was, what Bracton calls a command or precept of the king, without any other ſummons, *quòd ſit coram eo reſponſurus*, or *factûrus*, &c. or that he ſhould have ſuch a one there, *ad reſpondendum*, or *faciendum*. There was another commanding the ſheriff, *quòd faciat venire*, or *quòd attachiet*, or *quòd habeat corpus*, or *quòd ita attachiet quòd ſit ſecurus habendi corpus*. Many of theſe have been noticed in the foregoing account of proceedings. We ſhall now confine ourſelves more particularly to the ſummons, which was the uſual proceſs in real actions, as well thoſe that were poſſeſſory as thoſe that concerned the *proprietas*; and alſo in perſonal actions, in matters of contract, or for any injury.

A SUMMONS was either *general*, or *ſpecial*. There was a *general* ſummons before the eyre was held; this was to be in ſome very public place; and might be followed by eſſoins, to excuſe the abſence of thoſe who ought to attend. A *ſpecial* ſummons was in ſome particular action, to which if a perſon did not appear, he would be in default, altho' he was eſſoined upon the general ſummons[1].

Summons.

WHAT we have to ſay upon ſummons will be chiefly confined to this latter kind. It appears from Bracton, that if the party could be found any where in the county, he might be ſummoned; tho' if the ſummoners could not find him at his own houſe, they needed only ſhew the ſummons to ſome of his family, and not ſeek him further. If he had more houſes than one in the county, the ſummons

[1] Brac. 333.

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was to be at that where he moſtly lived, or had the moſt ſubſtance: if he had no houſe nor demeſne, it was to be at his fee. The ſummoners were to be at leaſt two in number, who were to teſtify before the court that they had executed the ſummons. A ſummons ought always to be ſerved fifteen days before the day on which the party ſummoned was to appear: and if there were fewer days, the ſummons was illegal, unleſs in ſome particular caſes where diſpatch was required; as when a church was vacant; when the parties were living in the county where the eyre was; or in caſes where merchants were concerned, who were entitled to what Bracton calls *juſtitia pepoudrous*. Again, on the other hand, ſometimes a longer time was allowed for ſummoning; as on account of a journey; and the time was lengthened according to the length of ſuch journey. But the common and legal ſummons, ſays Bracton, was fifteen days before the appearance[k].

A SUMMONS was illegal, if it was made only by one ſummoner; or by falſe ſummoners, and not by the ſheriff and his bailiffs. Again, if it was made when the tenant was beyond ſea or upon his journey, or even *cùm iter arripuerit*, when he was juſt ſet out; or if he was not found within the county, the ſummons was not binding[l]; for a man was not to accept a ſummons at all times and places, nor from every body, but only from thoſe who had a proper authority.

WHEN the tenant appeared, he might object any of the above irregularities as an exception againſt the ſummons. If he did not appear at the day of the ſummons, and the ſheriff did not return the writ, recourſe muſt be had to another writ, that being now out of date; but if the ſheriff had returned the writ, then, on account of the tenant's default, if it was in a real action, his land was taken, as in Glanville's time: but the writ on this occaſion was now

[k] Bract. 333. b. 334. [l] Ibid. 336. b.

called

called *magnum cape*; and if, after the firſt caption, he failed appearing at another day, he loſt his ſeiſin. There was another caption of the land by force of a writ that was called *parvum cape*; in all defaults after the firſt appearance the caption was made by *parvum cape*, which was the caſe in which Glanville ſays he could not replevy [m]. Thus, whereas in Glanville's time the caption was not till the tenant had been ſummoned three times, it was now after the firſt ſummons that the *magnum cape* iſſued.

If a perſon was lawfully ſummoned and did not appear, he would be puniſhed as a defaulter, unleſs he could ſend a proper excuſe or eſſoin. The law of eſſoins has already been mentioned; but it is treated ſo minutely by Bracton, and was of ſuch importance in the judicial proceedings of this period, that it deſerves to be re-conſidered.

Of eſſoins.

One principal excuſe for not appearing to a ſummons, was being *in ſervitio regis*. This, however [n], was not admitted as an excuſe if the party had been firſt ſummoned, becauſe he might have ſent his attorney to appear for him; nor even then would it avail, if he could conveniently come himſelf, or ſend. But this is laid down as the ſtrictneſs of law by Bracton, who admits that the king's pleaſure ſhould prevail, notwithſtanding any of the above circumſtances. The next eſſoins were what were called in Glanville's time, *ex infirmitate veniendi*, and *ex infirmitate reſeantiſæ*; which were now termed *de malo veniendi*, and *de malo lecti*. Beſides theſe, there were ſeveral others, that recurred leſs frequently; as a peregrination, or any reſtraint impoſed on a party; or if he was detained by enemies, or fell among thieves [p]; or was ſtopped by floods, a broken bridge, or tempeſt; unleſs, indeed, it could be proved that he ſet out at an unſeaſonable time, or ſuffered thoſe impediments through want of proper caution and care on his part. Being impleaded in the king's court,

[m] Vid. ant. 114. [n] Bract. 336. b. [o] Vid. ant. 115. [p] Bract. 337.

was

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was a good reaſon for not attending in an inferior one; or even, according to Bracton's opinion, being impleaded in the eccleſiaſtical court was a good excuſe.

A PERSON having any of the beforementioned excuſes ought to ſend one to make it for him. The form of making the eſſoin was to ſay, "that his principal, as he was coming to the court (if it was the eſſoin *de malo veniendi*) was ſeized with an infirmity in the way from his houſe to the court, ſo as not to be able to come either *pro lucro* or *pro damno*, and that he was ready to ſhew this." It was not now the practice, as it had been [q], for the eſſoniator to give any ſurety for proving the truth of this, but credit was given to his verbal declaration; though it ſeems, that in the caſe of barons, and other great perſons, who could better command a ſecurity, the law impoſed on them the burthen of finding pledges. In common caſes, therefore, the eſſoniator gave his faith, that he would produce his principal at another day, to warrant the eſſoin, and prove it [r] upon his oath.

As in actions, ſo in caſting eſſoins, a certain order was to be obſerved: thus, if a perſon was detained by ſome illneſs, he would caſt the eſſoin *de malo veniendi intra regnum*, and this might be followed by that *de malo lecti*; after this, the party would not be permitted to remove himſelf *extra regnum*, ſo as to caſt the eſſoin *de ultra mare*. The eſſoin *de ultra mare* was of various kinds; namely, *de ultra mare Græcorum*, and, *de citra mare Græcorum*. In the ſimple eſſoin *de ultra mare*, there was a delay of forty days at leaſt, and one ebb and one flood. If there was mention of any remote place, accompanied with ſome cauſe of neceſſary abſence, as a peregrination to St. Jago, or being with the army in Germany, or Spain, then a longer time was allowed, according as it ſhould ſeem proper to the

[q] Vid. ant. 115. [r] Brad. 337. b.

juſtices.

juſtices. The ſame diſcretion might be exerciſed by the juſtices, where the abſence was in ſome diſtant part of the kingdom; but they could never ſhorten the legal period of fifteen days. The eſſoin *ultra mare Græcorum*, was uſually in caſes of peregrination to the Holy Land. And here they made a diſtinction between a *ſimplex peregrinatio*, and a *generale paſſagium*. In the former, the time allowed was, at leaſt, a year and a day[s]: in the latter, the plea remained *ſine die*. This latter privilege was granted in favour of thoſe who were *cruce ſignati*; and it ſeems to have been allowed in conſequence of a papal decree which declared, that till the death or actual return of ſuch perſons, all their property ſhould remain intire and untouched.

It was held, that a perſon might have the eſſoin *de peregrinatione ad Terram Sanctam*, and afterwards that *de ultra mare*; and then, when he returned, he might have that *de malo veniendi*, and afterwards that *de malo lecti*: but if he had had that *de malo veniendi*, he could not, as was before ſaid, recur to that *de ultra mare*; and if he had had that *de ultra mare ſimpliciter*, he could not have that *ad Terram Sanctam*; the rule of eſſoins being, *approximare poſſunt regno, cùm fuerint implacitati, elongare autem non.* A perſon who was abſent upon a *ſimplex peregrinatio*, and ſtaid beyond the year and day, might have another forty days, and one flood and one ebb, by reaſon of the eſſoin *de ultra mare ſimpliciter*; and if he ſtill ſtaid, he might have fifteen days at leaſt, by an eſſoin *de malo veniendi citra mare*; and if a reaſonable cauſe could be ſhewed, the juſtices, as we have before ſeen, might allow more. After this, if he did not appear, he would be in default[t]. Indeed, when a perſon, by caſting the eſſoin *de malo veniendi*, admitted himſelf to be on his road to the court, there would have been an abſurd contradiction in allowing him to caſt

[s] Bract. 378. [t] Ibid. 339.

another,

another, which expreſſed that he was out of the kingdom. The eſſoin *de ſervitio regis* was likewiſe ſometimes *in regno*, and ſometimes *ultra mare*; and this likewiſe was ſometimes followed by that *de malo veniendi*, and afterwards by that *de malo lecti* [u].

THE eſſoin *de ſervitio regis*, which was more peremptory than any of them, being without any limitation of time, was not allowed in certain pleas. Thus, it was not allowed in an aſſiſe *ultimæ præſentationis*, for fear of the lapſe; nor in dower, becauſe of the conſideration due to a widow who had only a life-eſtate; nor, as ſome thought [x], in the *aſſiſa mortis anteceſſoris*, in favour of the infant. It did not *de jure* lay for a perſon not immediately in the king's ſervice, though it was allowed *de gratiâ*, as was before ſaid; nor for one conſtantly in the king's ſervice, unleſs while he was actually employed in ſome expedition: it did not lay for the attorney, as a perſon ſo engaged ſhould not be an attorney. Bracton repeatedly lays it down, that the king's warrant for this eſſoin ſhould never be granted but on a reaſonable cauſe; though, on the other hand, he is as explicit in declaring that, whatever might be the cauſe, the juſtices ſhould not quaſh it, but wait the king's determination thereon.

THE eſſoin *de malo veniendi* implied that the party was taken ill on the road; and therefore, if the eſſoniator, upon interrogation, ſaid he left him ill at home, it would not be allowed: though a caſe might happen, where, of neceſſity, it muſt be received; as if the party had been eſſoined *de malo lecti* in ſome other action, and *languor* was adjudged, he muſt, under that return, confine himſelf to his houſe; and therefore, when ſummoned in another action, and intitled to the eſſoin *de malo veniendi*, it muſt of neceſſity be received, though he was actually in his own houſe. The confinement which the adjudication of *languor* impoſed

[u] Bract. 338. b. [x] Ibid. 339. b.

on

on the party diſpenſed with the ſtrictneſs otherwiſe obſerved in this, and ſome other caſes[y].

HAVING thus mentioned generally the nature and effect of theſe eſſoins, it next follows, that we ſhould inquire by whom and where they might be uſed. In the firſt place, no minor, when known to be ſuch, could eſſoin himſelf; nor could a perſon of full age be eſſoined againſt him, eſpecially in an aſſiſe; for a perſon of full age, if preſent, could ſay nothing to prevent the taking of the aſſiſe; though it ſhould ſeem as if he might be eſſoined in a ſuit for land, of which he was firſt infeoffed himſelf. The reaſon given by Bracton why a minor ſhould not be eſſoined, is, becauſe he could not ſwear, nor warrant the eſſoin. No eſſoin lay for a diſſeiſor, for though he did not come, his bailiff might; nor for the bailiff. This rigid practice ſeems to be *in odium ſpoliatoris*[z], who ought not to be indulged with a delay of fifteen days; though it lay for the demandant, who was the perſon ſpoiled. It did not lay for one committed *corpus pro corpore* in cuſtody to anſwer; nor for any one where the ſheriff was commanded *quòd faciat eum venire*, or *quòd habeat corpus ejus*, if the proceſs had gone through the whole *ſolennitas attachiamentorum*; but on the firſt day of attachment the party might have an eſſoin; for it was a general rule, that *de jure* an eſſoin might follow every ſummons, or attachment, where a plea depended; on the contrary, it was a rule, *ubi nullum placitum, ibi nullum eſſonium*.

AN eſſoin did not lay for a perſon who had appointed an attorney, unleſs they had by accident both eſſoined themſelves; nor for one who had already eſſoined himſelf, till he appeared; nor for one appealed *de forciâ*; nor in an appeal *de pace*, *de plagis*, or *de roberiâ*; notwithſtanding which it is laid down by Bracton, that if ſuch perſons did not appear, they would be excuſed by proper eſſoin. Sometimes

[y] Bract. 340. [z] Ibid. 340.

there

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there would be a *dies datus conſenſu partium ſine eſſonio*; and in ſuch caſe, neither would be permitted to eſſoin. If a perſon was ſeen in court before the eſſoin was caſt, the eſſoin would, nevertheleſs, be admitted. An eſſoin would not lie, after a caption of land *in manus regis* for a default [a].

If a writ was againſt ſeveral who held *in communi ſimùl et pro indiviſo*, each might have an eſſoin *de malo veniendi* together on the ſame day, or one after another on diverſe days [b], till each had had an eſſoin; and none ſhould have more than one eſſoin till all had appeared together; ſo that thoſe who were eſſoined firſt, might have ſeveral appearances, and ſeveral days, till all appeared together: but an eſſoin was not allowed at every appearance, on account of the infinite delay this would occaſion. If the inheritance had been divided, and one was impleaded alone for his part, and he declined anſwering without his *participes*, or parceners, and they were ſummoned; each had one eſſoin before appearance, but not *viciſſim*, till it was eſtabliſhed that they were *participes*, and then they eſſoined *viciſſim*, as beforementioned. If the tenants to the writ were not *participes*, but held by different rights, they could not eſſoin *viciſſim*, becauſe theſe were different pleas: the ſame where they held *pro diviſo*. But huſband and wife might eſſoin *ſimùl et viciſſim*, like *participes*, on account of the intirety of their rights; and if one made default, it affected them both, which was not the caſe even with *participes* [c]. When all the parceners had appeared together, and it happened that one or more of them afterwards eſſoined himſelf, or a day was given to the parties, if preſent, they might recommence their eſſoins, as at the firſt day of ſummons. In like manner, if the writ contained more than one demandant, whether they were *participes*, or huſband and wife, they might eſſoin *ſimùl et viciſſim*.

[a] Bract. 341. [b] *Simul et viciſſim.* [c] Bract. 341. b.

If

If a demandant or tenant, not chuſing to appear himſelf, appointed an attorney, then the eſſoin was to be made in the perſon of the attorney, and not in that of the principal, except, as will be ſeen hereafter, in the eſſoin *de malo lecti*[c]. Yet, if the attorney ſhould die, the principal might eſſoin himſelf and his attorney *de morte*, as it was called; and he might remove his attorney and eſſoin himſelf; but it was only in theſe two caſes that the party could caſt an eſſoin after appointing an attorney[d].

If one or more perſons were vouched to warranty, before appearance both voucher and vouchee might have an eſſoin; and if the vouchers were more than one, they might eſſoin *ſimùl et viciſſim*, as before mentioned; ſo if the tenants were more than one[e]. After the wager of duel, the champion, as well as his principal, might eſſoin *ſimùl et viciſſim*.

The time for making the eſſoin, was the firſt day, that is, on the return of the writ; and it was not ſufficient, ſays Bracton, if the eſſoin was made on the ſecond, third, or fourth day, yet, adds the ſame authority, the perſon ſummoned was to be *expected* till the fourth day, in caſe he ſhould come, or ſend a meſſenger to excuſe his abſence, if he had ſuch matter to alledge as would conſtitute a good eſſoin: and if he had, and cauſed himſelf to be eſſoined even on the ſecond or third day, it ſeems, from Bracton, that the eſſoin would be allowed, and a day would be given him by his eſſoniator; yet, at that day, if the demandant pleaſed to proceed on the default, the court would allow him ſo to do; and if the tenant could alledge none of the excuſes abovementioned for his delay, he would loſe his ſeiſin.

The eſſoin was to be made in open court, before the juſtices; nevertheleſs, if by miſtake it was made before another, it was allowed *a gratiâ*, like the eſſoin caſt after the firſt day, as juſt mentioned; and the default would be ſaved, unleſs the demandant proceeded for judgment on

[c] Bract. 342. [d] Ibid. 342. b. [e] Ibid. 343.

the

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the default, when such an essoin would be adjudged to be null and void.

An essoin might be had upon every appearance, and day given in court, whether on praying a view, vouching to warranty, or on a day given *spe pacis*, as it was called, at the prayer of the parties, in order to compromise the matter in dispute, or for any other purpose[f].

*De malo lecti.*

The essoin that occasioned most discussion in the practice of real actions was that *de malo lecti*, which commonly followed immediately upon that *de malo veniendi*; for where a person, having been detained on the road by sickness, and having cast the essoin *de malo veniendi*, had found himself obliged to return home; the order of essoins, conformably with what was likely to be the real fact, led to the essoin *de malo lecti*. Upon this, it was usual for the court to direct *a view*, to see whether it was, as they called it, *malum transiens*, or whether it was *languor*: if the former, then he had another day, at the distance of fifteen days at least; if the latter, he had the space of a year and a day. But the essoin *de malo lecti* did not, in all cases, follow that *de malo veniendi*. It did not follow it, in a writ of entry; unless when the writ of entry was turned into a writ of right by the form of counting; so on the other hand, when a writ of right was by the form of counting turned into a writ of entry, and the tenant put himself upon a *jurata*, the essoin *de malo lecti* would not be allowed: the same, if in a writ of right the counting was of an inheritance descending from a common stock to co-heirs; for this could not be determined by the duel, or great assise. For the same reason it was not allowed in a writ of right of dower; it being laid down as a general rule by Bracton, that where the duel, or great assise might follow; and as long as the duel, or great assise might be had; there, and so long, this essoin would lie; and that where, and when, either of those trials could not be had, it did not lie[g].

[f] Bract. 344. [g] Ibid. 344. b.

This

THIS ſeems to be a better rule than to ſay, that the eſſoin *de malo lecti* lay in all writs of *præcipe*; for though it did lay in writs of right as long as they retained their primary nature; yet, as this might be changed by the form of counting, it became a leſs certain rule than the other. However, by one or the other of theſe rules it might eaſily be pronounced, whether both the eſſoins *de malo veniendi* and *de malo lecti* lay, and where only the former [h].

THE eſſoin *de malo lecti* would not lie, even in the actions before-mentioned, for any of the following perſons. Thus, it would not lie for a demandant, tho' he might have that *de malo veniendi*; but his pledges would be exacted if he made default in appearing: nor for an attorney; tho', if an attorney was *languidus*, this was ſuch an inſurmountable impediment, that it would, from neceſſity, be admitted as an excuſe, but not till the fourth day. It would not lie for a warrantor, till he had entered into the warranty; becauſe then he might put himſelf on the duel, or great aſſiſe. It would not lie before the *juſtitiarii itinerantes*, for a perſon reſiding in the ſame county, becauſe he might appoint an attorney [i]; nor, for the ſame reaſon, where the tenant lived in London [k]. Nor would it lie, where it was not preceded, mediately or immediately, by the eſſoin *de malo veniendi*; but an eſſoin *de malo lecti*, ſo caſt, would be turned into that *de malo veniendi*, and would operate only as ſuch [l].

THIS eſſoin ought to be made on the third day incluſively before the day given by the eſſoniator in the eſſoin *de malo veniendi*, and it ought to be caſt by two perſons, who were called, not eſſoniators, but *nuntii*, meſſengers; becauſe they were ſent to make an excuſe, ſays Bracton, and not to eſſoin; for they received no day, nor did they ſwear to have a warrantor at a certain day to prove the eſſoin. This diſ-

[h] Bract. 346 b. 347.
[i] Ibid. 349. b.
[k] Ibid. 350.
[l] Ibid.

tinction

tinction between an *essoniator* and *nuntius* was very material, and was known in other instances than this of the essoin *de malo lecti*. An essoniator must come from the party; a *nuntius* might come either from the party, or of his own head, to inform the court of any impediment that prevented the party's attendance; and he would be heard so late as the fourth day, or later, down to the time of judgment on the default [m]. It was by a *nuntius*, as well as by an essoniator, that many of the before-mentioned excuses for non-appearance used to be made.

When, therefore, the *nuntius* had delivered the excuse, the demandant had a writ *de faciendo videre* [n], directed to the sheriff, to this effect: *Mitte quatuor legales milites de comitatu tuo apud villam, &c. ad videndum utrùm infirmitas, quâ A. in curiâ nostrâ coram justitiariis nostris apud W. essoniavit se de malo lecti versus N. de placito terræ, sit languor vel non. Et si sit languor, tunc ponat ei diem à die visûs sui in unum annum et unum diem apud Turrim Londini, quòd tunc sit ibi responsurus, vel sufficientem pro se mittat responsalem. Et si non sit languor, tunc ponat ei diem coram justitiariis nostris apud W. &c. quod tunc sit ibi responsurus, vel sufficientem pro se mittat responsalem. Et dic quatuor militibus illis quòd sint coram iisdem justitiariis, &c. ad terminum prædictum, ad testificandum visum suum, et quem diem ei posuerunt; et habeas ibi nomina militum, &c* [o]. This writ was to be faithfully and literally executed by the sheriff, and needs no other observation, except in that passage where a day is given at the Tower. Bracton says, this was done because the constable was always present there to receive the appearance of parties, who perhaps had a day to appear, when no justices were sitting on the bench at Westminster. However, if it happened that the justices were sitting, the party was still to keep his day before the

[m] Bract. 345. [n] Ibid. 351. [o] Ibid. 352. b.

constable;

conſtable; and the conſtable would give him a day, either before the juſtices of the bench, or, if the pleas were adjourned before the juſtices itinerant, then at the eyre[p].

If the four knights, or any of them, failed to appear, to make certificate of their view, proceſs of attachment iſſued againſt them; for neither the view, nor certificate thereof, could be made by leſs than the four knights named; and therefore, if one of them died, a new writ iſſued for the ſheriff to ſubſtitute another[q].

It was a rule, that after the eſſoin *de malo lecti* was received, the party ſhould not *ſurgere*, as it was called, that is, not ſtir abroad, much leſs appear in court, without having *licentia ſurgendi*. This licence was to be obtained by ſending ſome perſon to inform the juſtices, that the party eſſoined had recovered his health. The ſtrictneſs with which the perſon eſſoined was to obſerve the eſſoin, as well before view as after judgment of *languor* was pronounced, is very ſingular. Bracton declares, that *decinctus, et ſine braccis, et diſcalceatus ſe tenere debet in lecto*; yet he adds, *alicubi poterit indui veſtimentis ſi voluerit*: however, if he went out of his chamber, he was not to go out of his houſe, under pain, if found abroad, of being arreſted by the demandant, and of loſing his land as a defaulter in breaking his eſſoin. Such arreſt, indeed, ought properly to be made by the coroners, or ſome officer of the king's court. When the officer came with ſufficient teſtimony of other good and lawful men to prove that he had broken his eſſoin, the party might endeavour to prove the contrary; he might ſay, *quòd cùm eſſet tali die apud talem locum et in lecto, ſicut ille cui languor adjudicatus, et in pace domini regis, venit ibi ipſe talis petens, et nequiter, et* IN FELONIA *extraxit eum è domo ſuâ, et à lecto ſuo, & in roberiâ abſtulit ei tantum, contra pacem domini regis*; *& ſic offert, &c.* Upon this, a proceeding would commence, as in an ap-

[p] Bract. 353. [q] Ibid. 354.

peal,

peal, and the matter would be determined by the duel, or inquisition; and according to the event of this trial, one of the parties would lose for ever; the tenant, *quia stultè surrexerit*; the demandant, because he maliciously drew the party essoined from his house; and as he meant to gain something by that proceeding, it was but reasonable, says Bracton, that he should likewise be a loser. If the tenant was arrested in a manifest act of breaking his essoin, the demandant might tacitly wave the default in this, as in other cases, by doing some act which shewed he did not mean to proceed on the default; as taking a day, *prece partium*, or the like [r].

ALTHOUGH before the view the party essoined might obtain *licentia surgendi*, yet afterwards, and when *languor* had been adjudged, he would be obliged to confine himself in the way above-mentioned, without any *licentia surgendi*, the justices having no jurisdiction to grant it; for the day now stood before the constable, whose duty it was to remit the plea to the justices [s]. At the end of a year and a day, the party was to appear in person, or, if unable, he was to send a *responsalis*: no essoin could now be had, that *de malo lecti* being the last. If he was still unable to appear, there only remained for the justices to adjudge it *morbus sonticus*. Whatever was done, the constable was to make a record thereof, and transmit it to the justices, and give a day before them *in banco*. Thus ended the authority of the constable. If this essoin was made not in the king's but in the sheriff's court, then, instead of the Tower of London, some castle, or other certain place, within the county, was appointed for the appearance at the end of a year and a day [t]. If the party did not keep the day appointed by the four knights, his land was taken by *parvum cape*, the same as if he had actually appeared, because

[r] Bract. 358. [s] Ibid. 358. b. [t] Ibid. 363.

the

the return of the knights was as a record, which the party essoined was not permitted to deny.

THERE was another essoin, which was considered as anomalous, and not at all within the course and rule by which other essoins were governed. This was the essoin *de malo villæ*; which was, when the party had appeared, but was afterwards, before any answer to the suit, taken ill in the town where the court sat, and was unable to attend. This, like the essoin *de malo lecti*, was signified, not by an essoniator but a *nuntius*. The party was to send two different *nuntii* every day, for four days; on the fourth day the justices were to send four knights to the sick person, to accept an attorney from him, and if he was not to be found he would be in default. This essoin *de malo villæ* did not lie in the county court, nor before the justices assigned to take any assise, or jury, nor in any case where the party was not to be expected till the fourth day[u].

WE have seen what was the method of casting an essoin, in order to save a default on the return of the writ of summons. We now come to speak more particularly of *defaults*, and their consequences. This, like most other subjects, is handled very fully by Bracton, with whose assistance we may attain a complete idea of this part of our ancient judicial proceedings[x]. Defaults.

IF the tenant sent no essoin, nor appeared the first day, nor the second, third, nor fourth; then, provided the demandant *obtulit se* on either of those days before the fourth, the land would be taken into the king's hands; which caption was not followed by any severe penalty: for if the tenant appeared within fifteen days after the caption, and demanded the land in court *per plevinam*, and if at the day given he could do away the default, the possession would be restored, or, as Bracton calls it, *reformed*. It seems, that if the tenant failed to appear the first day, and the de-

[u] Bract. 363. [x] Vid. ant. 114.

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mandant did appear; then, notwithſtanding the tenant appeared the day after, if he could not ſave his default, he would loſe his ſeiſin. If neither appeared the firſt day, and both on the ſecond, one default was ſet againſt the other, and no advantage could be taken by the demandant; and ſo of the other days down to the fourth: the ſame, if the demandant appeared the firſt day, and the tenant not, and the tenant the ſecond, but the demandant not. If they both appeared on the third, one default was ſet againſt the other [y].

During the four days, the demandant and tenant were allowed to ſhew excuſes for their non-appearance; and the tenant might excuſe himſelf even after the four days, if the ground of his excuſe was ſuch an impediment as really prevented his appearing, and he had ſent a meſſenger to notify it within the four days. The grounds of excuſe which the court would allow, were ſuch as the following: He might ſay that he was put under reſtraint, or impriſonment (provided it was not on account of any crime); that he fell among robbers, who bound and detained him, ſo as to prevent his ſending a meſſenger; that he was ſtopped by flood, ſnow, froſt, or tempeſt, by a broken bridge, or the loſs of a boat, if there was no other ſafe paſſage.

If within the fourth day he neither came, nor ſent ſome ſuch excuſe for not coming, the following entry was made: *A. obtulit ſe quarto die verſus B. de placito quòd reddat ei tantum terræ, &c. Et B. non venit. Et ſummoneas, &c. Judicium, &c.* that the land ſhould be taken into the king's hands; upon which there iſſued the writ of *Magnum Cape*, as it was called, to this effect: *Cape in manum noſtram per viſum legalium hominum, &c. quam A. in curiâ, &c. clamat ut jus ſuum verſus talem pro defectu ipſius B. Et diem captionis ſcire facias juſtitiariis, &c. Et ſummoneas, &c. prædictum B. quòd ſit coram iiſdem juſtitiariis, &c.*

*Magnum Cape.*

[y] Bract. 364. b.

*inde*

*inde reſponſurus et oſtenſurus quare non fuit coram iiſdem juſtitiariis, &c. ſicut ſummonitus fuit*; or, as the caſe might be, *quare non obſervavit diem ſibi datum per eſſoniatorem*[z], *&c.* The writ of *magnum cape* was the proceſs in all defaults before appearance in court; or, what amounted to the ſame thing, before the appointment of an attorney.

THE day of the caption ought to be indorſed, in order to ſhew the time of fifteen days, within which the land might be demanded by plevin. The demand of plevin was to be entered upon the roll in this manner: *Talis petiit per talem tali die terram ſuam per plevinam, quæ capta fuit in manum domini regis, per defaltam quam fecit verſus talem, coram juſtitiariis noſtris, tali die.* Upon this no writ iſſued, nor was any thing done, except directing the party to keep the day given him in the writ of caption. If this plevin, and acceptance of the day, was done by the tenant himſelf, it ſeemed to preclude him from denying any ſummons on the caption; if by attorney, it was ſtill left open to him to deny both the firſt and ſecond ſummons. The effect of the caption was not to deprive the tenant of the occupation and uſe of the land; for if ſo, it would be rather, ſays Bracton, a diſſeiſin than a diſtreſs: ſhould, therefore, a church become vacant in the mean time, the preſentation belonged to the tenant.

AFTER this demand *per plevinam*, the land was not immediately replevied to the tenant before he appeared, but it was firſt ſeen whether the demandant would proceed on the cauſe of action, or on the default: if the former, it was a relinquiſhment of the default, which immediately became null, and the land was replevied[a]: if the latter, it was not replevied till he had ſaved his default; in which if he failed, the ſeiſin was adjudged to the demandant.

[z] Bract. 365. [a] Ibid. 365. b.

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Upon the ſummons in the *magnum cape* the tenant was allowed no eſſoin, nor had he the *dies rationabilis*, as it was called, that is, the indulgence of fifteen days; becauſe, being in contempt, he deſerved, according to Bracton, no more favour than in caſe of a diſſeiſin. The ſummoners were to come, if neceſſary, to teſtify the ſummons. At the return of the *magnum cape*, if the tenant appeared, and the demandant made choice of proceeding on the default, the tenant might deny the ſummons (and ſometimes the eſſoins *de malo veniendi* and *de malo lecti*, if any); and if the ſummons was teſtified by the ſummoners on examination, he muſt wage his law thereof; and upon that another day would be given to make his law, and pledges likewiſe muſt be found. Upon the day appointed for making his law, an eſſoin lay for both parties[b]. If at length he made his law, he ſaved the default, but was obliged the ſame day to anſwer to the action, that no further delay might be added to the interval between waging and making law. If he failed in making his law, he loſt, and the demandant recovered ſeiſin of the land: further, the tenant, and, according to Bracton, the pledges likewiſe were to be *in miſericordiâ*.

If the tenant did not appear to the *magnum cape* on the firſt day, but on the ſecond, third, or fourth, and the demandant came the firſt day and demanded judgment of both defaults, the tenant was required to defend both; unleſs he had precluded himſelf, with reſpect to the latter, by demanding plevin in perſon, as before mentioned; for if both were not removed, he would continue in default. Should the default not be ſaved in ſome of the aforeſaid ways, judgment would be given for the demandant to recover ſeiſin of the land taken by the *magnum cape*[c]; upon which a writ of *ſeiſinam habere facias* would iſſue to this

[b] Bract. 366. [c] Ibid. 366. b.

effect:

effect: *Scias quòd A. in curiâ, &c. per considerationem curiæ recuperavit seisinam de tantâ terræ, &c. ut de jure suo, versus B. per defaltam ipsius B. Ideo tibi præcipimus quòd ipsi A. de prædictâ terrâ sine dilatione plenariam seisinam habere facias, &c.*

When the tenant had lost in this manner by default, there still remained a remedy for him; for he might recover in a writ of right at any time till the duel was waged, or the tenant had put himself on the great assise. Some thought it was open to him till the four knights were summoned; others, till the twelve were elected; but it was agreed, that no recovery could be had of land taken for default, after the twelve were elected. The tenant had a remedy likewise, if there had been any fraudulent contrivance in the demandant to prevent his being summoned; for when this was discovered, there would be neither a caption, nor judgment for a default; and if judgment was given, and any thing done thereon, it should be revoked. The tenant might recover likewise, if judgment of seisin had passed while he was abroad, and he had not been prevented, as before-mentioned, by the service of a summons. Bracton asks, by what writ he should proceed in this last case; for neither the justices nor demandant had been guilty of any irregularity, as the summoners testified the summons to have been lawfully made? And he thought that the tenant might proceed by assise of novel disseisin; for he was in effect unjustly disseised, tho' by a judgment in court, and the demandant, says Bracton, in his answer to the assise[d], might call upon the king's court to warrant him; and then the court, which had been so deceived, would revoke and vacate the process and judgment.

As the judgment of seisin might be vacated and revoked, so might the default be saved before such judgment was passed; and this in various ways.

[d] Brac. 367.

The

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THE principal of these was, the excuse which was before mentioned when we were speaking of essoins, namely, a warrant that he was in the king's service. This was signified by a writ to this effect. After reciting that he was in the king's service, it went on: *ideo vobis mandamus, quòd propter absentiam suam ad diem illum coram vobis non ponatur in defaltam, nec in aliquo sit perdens, quia diem illum ei warrantizamus.* A person might be protected by such a writ *de servitio regis* for a certain term, as from such a day to such a day; and they used to be obtained not only to save defaults in particular actions, but to save the default of appearance on any general summons, as that to appear before the justices at their eyre. As the king's service was a sufficient warrant to dispense with attendance in court; so was the being party to a suit in the superior court a sufficient excuse for not appearing in the county, court-baron, or other inferior court, and a writ used to issue to warrant him in such absence[e]. The justices of the bench might send a writ to the justices itinerant, informing them that a party was attendant before them, and this would excuse his appearance in the eyre. The warrant *de servitio regis* could never be applied so as to enable the party making default to gain any thing, but merely to indemnify him for a loss; nor could it suspend a judgment in any matter *contra pacem regis*, as outlawry or the like. The other grounds upon which a tenant might get the judgment and execution revoked and vacated, were such as have been before stated as sufficient to save the default before judgment; such as imprisonment, being abroad before the summons, and other matters, which shewed the absence to be not voluntary, but of necessity.

THE warrant *de servitio regis* was liable to be controverted. It might be shewn, that the party was at another

[e] Bract. 367. b.

place

place than that ſtated in the warrant; or, perhaps, even in court, but declining to enter an appearance at the time he was ſuppoſed by the writ to be *in ſervitio regis*. Bracton is of opinion, that ſuch matter might be objected againſt the writ; tho' he admits, as on a former occaſion, that if a repreſentation was made to the king, and he perſiſted in continuing the warrant *de ſervitio*, there was no remedy[f].

BEFORE judgment of ſeiſin, a default might be done away by certain acts of the demandant which were conſtrued as an implied renunciation of the default; as if he accepted a *dies amoris*, or removed the plea, or caſt an eſſoin. When therefore he took a *dies amoris*, it was uſually accompanied with a proteſtation, *quòd ſi amor ſe non capiat, ſalvus ſit ei regreſſus ad defaltam*. A default might be releaſed either by a principal, an attorney, or a warrantor[g].

THUS far of defaults committed by the tenant. The law was nearly the ſame as to the demandant. Thus, if he made default and the tenant appeared, and the writ came, notwithſtanding the demandant might offer himſelf at the fourth day, the tenant would go quit, and the demandant would be *in miſericordiâ*. The demandant had the ſame excuſes, which we have juſt ſhewn the tenant to have, to ſave his default. If neither the demandant nor writ came at the firſt day, and the tenant had eſſoined himſelf, then[h] altho' there was no authority for proceeding, yet Bracton ſays, he ſhould not be entirely abſolved, but *dicatur ei quòd eat ſicut venit*: the ſame, if the demandant came, and neither the writ nor tenant. But if the demandant and tenant both came, or either had eſſoined himſelf, and the writ did not come, yet ſtill *alius dies* ſhould be given the parties, and the demandant, or his eſſoniator, would be commanded to cauſe the writ to be returned, as would likewiſe the ſheriff. Again, if both parties were preſent, and the

[f] Bract. 368. Vid. ant. 405. [g] Bract. 369. [h] Ibid. 369. b.

writ

writ not returned, the tenant might demand the judgment of the court, whether he ought to anſwer without a writ; and then he would have judgment, *quòd quietus recedat de brevi illo.*

If the writ was againſt more than one tenant, and one appeared, one caſt an eſſoin, and one made default, *alius dies* would be given to the two former; but the other was to be proceeded againſt by *cape*, taking, if he was one of ſeveral parceners, only his portion of the land. If the ſame default happened where the demandants were parceners, then a writ would iſſue againſt the defaulter, ſummoning him *ad ſequendum cum B. & C. participibus ſuis in placito quod eſt inter A. B. C. petentes et D, &c. et unde idem D. dicit quòd non vult iiſdem B. & C. reſpondere ſine prædicto A. &c.* If the defaulter did not appear at the return of this writ, nevertheleſs *B.* and *C.* might proceed, as for their part, if they pleaſed[1]. If huſband and wife were demandants, or tenants, they were not conſidered as *participes*, but the ſame perſon; and the default of one, was the ſame as the default of both. If they were tenants, and the wife ſaid her huſband was dead, the judgment of ſeiſin would be ſuſpended, though ſhe had no proof or *ſecta* to eſtabliſh the fact; and a day would be given for the wife to prove the death, and the demandant the life; and it ſeems from Bracton, the mere dictum of the wife was, in this caſe, held ſufficient to throw the *onus probandi* on the demandant.

*Parvum cape.*

We have before ſaid, that, upon a default, the caption of the land, or other thing in queſtion, was either by *magnum cape*, or *parvum cape.* It will be proper to examine more particularly, when the one and when the other was the proper remedy. Bracton lays it down as a general rule, that in all caſes where a perſon might deny a ſummons *per legem*, (which he might before appearance) whether in the king's court, in the county, or court baron,

[1] Bract. 370.

there

there the caption ſhould be by the *magnum cape:* the ſame, where on default to a writ of *pone* for removing a plea from the county to the king's court, though the tenant had in the county put himſelf on the great aſſiſe [k], and the four knights had been ſummoned, if the tenant made default to the writ of *pone:* ſo upon a removal from the court baron to the county, on account of the lord having *de recto deficiſſe:* ſo when all the pleas *in banco* were put *ſine die*, on account of the *iter juſtitiariorum*, and were again re-ſummoned; and ſo in all caſes of re-ſummons, except in the re-ſummons after a determination of baſtardy in the eccleſiaſtical court, where the proceſs was *parvum cape;* becauſe there remained nothing further but judgment to be paſſed, which was not the caſe in the former inſtances, in all which the party might wage his law of non-ſummons.

If a perſon had once appeared in court, and had another day, ſo as that he could not deny the day and ſummons *per legem*, or if he had done any thing that furniſhed a preſumption of his having been ſummoned, as making an attorney; in ſhort, Bracton lays it down generally, that where a perſon had once appeared in court, and then made default, the caption ſhould be by *parvum cape* [l]. The diſtinction when the one or other of theſe writs ſhould be uſed, ſeems very extraordinary, as there is no difference in the forms given by Bracton; nor does there ſeem to be any in the effect. Indeed, the latter is ſpoken of very ſlightly by that writer: he barely ſays, if the party did not come on the firſt day of the ſummons, on the *parvum cape*, he ſhould be expected till the fourth; and on the fourth, the ſeiſin ſhould be adjudged to the demandant; and the tenant ſhould have ſuch recovery *quale habere debebit;* as if he might recover in the ſame manner, as had been before

[k] Bract. 370. b. [l] Ibid. 371.

mentioned

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mentioned in case of a *magnum cape*[m]. The whole of the learning which we have just been delivering respecting the *magnum cape*, seems to have been equally applicable to the *parvum cape*.

We have been speaking of the process by caption, as the regular process in actions real: it was likewise used in some mixt actions; which were both *in rem*, and *in personam*; where each party might be said to be *actor* and *reus*, though, in form of law, he alone was *actor* who brought the writ; as where the inheritance was divisible, either *ratione rei*, or *ratione personarum*, and one *particeps* brought a writ against another *pro rationabili parte*: so where land was *in communi* to persons who were not coheirs, and one brought a writ for a division: so where a contest arose between neighbours for a boundary, and one brought a writ against the others *pro rationabilibus divisis*. For if in either of these three actions, or in any similar to them, a default happened, the process was the same as in real actions. But where two actions were contained in one writ, one being *in personam*, the other *in rem*; as where a person was summoned to shew *quo warranto* he held such land, and then the writ went on and said *quam dominus rex clamat esse eschætam suam*; in this case, as there would arise an appearance of claim to two sorts of process, Bracton thought, contrary to the opinion of some others, he should have that which carried most compulsion, namely, the process real by caption. Sometimes these two matters used to be separated; and then upon the writ which contained the *quo warranto*, or *quo jure*, the process was attachment, and not caption of the land[n].

Writ of *quo warranto*.

It may be here remarked, that by this simple writ of *quo warranto*, or *quo jure*, nothing could be recovered; for it was merely to call upon the tenant to shew by what title or

[m] Bract. 371. b. [n] Brac. 372.

warrant

warrant he held; and if he held by none at all, yet this gave no title to the demandant; but the demandant having made this discovery, must resort to another writ if he would recover the land [p]. This writ of *quo warranto* or *quo jure*, by which a man might be called upon to shew his title, enabled a litigious person to disturb the peace of any man's estate, whenever he pleased. How far the party, so called upon, was required to disclose his title, does not appear. Bracton seems to speak, as if it went no farther than the title to possession, and the general point, whether by descent or purchase; and he seems to consider it as an ungracious and unhandsome proceeding. From the instance given by Bracton, it may be collected, that this writ of discovery lay only for the king [q].

The count.

After the essoins, and other delay, or at the first day of the summons, in the writ of right, if the parties both appeared, the demandant was to propound his *intentio* [r], as it was called by Bracton, or *count*, and shew the form in which he meant to contest his claim. For this purpose, after the writ was read, the demandant or his advocate, in the presence of the justices on the bench was to declare himself to this effect: *Hoc ostendit vobis A. quòd B. injustè ei deforceat tantum terræ cum pertinentiis in tali villâ, et ideò injustè, quòd quidam antecessor suus nomine C. fuit inde vestitus et seisitus in dominico suo, ut de fœdo et in jure, tempore Henrici* REGIS AVI DOMINI REGIS, [*or* TEMPORE REGIS *Ricardi avunculi domini* REGIS, *or* TEMPORE JOHANNIS REGIS PATRIS *domini* REGIS, *or* TEMPORE HENRICI *regis qui nunc est*] *capiendo inde expletia ad valentiam quinq; solidorum, sicut in bladis, pratis, redditibus et aliis exitibus terræ; et de prædicto C. descendit jus* TERRÆ ILLIUS, or as some expressed it DESCENDERE DEBUIT *cuidam D. ut filio et*

[p] Bract. 372. b.

[q] Ibid.

[r] Bracton here borrows a term from the canon-law, as Glanville did the term *petitio* from the civil, to signify the *count*.

*hæredi*,

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*hæredi, et de prædicto D. cuidam E. ut filio et hæredi, et de prædicto E. isti A. qui nunc petit, ut filio et hæredi. Et quòd tale sit jus suum, offert disrationare per corpus talis liberi hominis sui, vel alio modo, sicut curia consideravit.*

CERTAIN parts of the *count* are worthy observation. Thus, we see, it was not sufficient barely to say, *peto tantam terram ut jus meum*, but this claim was to be grounded upon some suggestion that would demonstrate it, and shew in what manner and by what degrees the *jus* ought to descend to the demandant. Again, as the object of a writ of right was to recover as well the *jus possessionis* as the *jus proprietatis*, upon the seisin of a certain ancestor, it was not enough to say that such ancestor was seised *in dominico suo, ut de libero tenemento*, only, but that he was seised *in dominico suo, ut de fœdo*, which included in it the *liberum tenementum*, and whole *jus possessionis*: nor was it enough to say that he was seised *in dominico suo, ut de fœdo*, without adding *et jure*, which included in it the *jus proprietatis*. Nor would the concurrence of these two rights, those of possession and propriety, called *droit droit*, suffice, unless the ancestor named held the land *in dominico suo*; for if [r] it was *in servitio* only, he would fail, the writ of right being for a recovery *in dominico*; for the demandant counted on the seisin of the ancestor; and therefore the same seisin must be recovered which the ancestor had. Again, it was not sufficient that the ancestor was seised *in dominico suo, ut de fœdo et jure*, unless he added, that *expletia cepit*. For though a person may have *a liberum tenementum* and *fœdum* without the *expletia* in a possessory action, as was before shewn in the assise of novel disseisin and mortauncestor; yet the seisin of the *proprietas* was required not to be so momentary, but that there should be time to take the *expletia*; and therefore it was held, if there was no mention of *expletia*, the action would abate. Thus,

[r] Bract. 372. b.

if

if in fact no *expletia* were taken, and the party had suffered the time of bringing an assise of novel disseisin or mort-auncestor to pass, and brought his writ of right, he would have no recovery.

AGAIN, it was required that a certain time should be mentioned, that is, the time of some king, as *tempore talis regis*; for a writ of right, like other writs, had a time of limitation. Thus in the time of Glanville[a] it was not to exceed the time of Henry I. and now, by a late statute, it was not to exceed the time of king Henry II. the present king's grandfather; the reason given for which was, that beyond that period no one could succeed in making a proof, whatsoever right he might have: for a demandant could not make proof, says Bracton, but *de visu proprio*, or that of his father, who enjoined him to testify the fact, if any contest should arise upon it; and if Bracton wrote towards the close of this reign, the above period of limitation was perhaps as far as this sort of proof could well reach. When, therefore, a demandant mentioned the time of Henry I. he would fail, for want of proof.

Tender of the *demi-mark.*

IF his ancestor happened not to be seised in the time of the king mentioned in the writ, although he was seised in another king's reign, yet the demandant might perhaps fail though this error, the same as if he had never been seised at all. But the issue to be tried by the great assise being, which of the parties had most right; the king's time did not properly come within the consideration of the recognitors; and the right between the parties might be decided with justice in favour of the demandant, although he had failed in the time of seisin mentioned in his count: when, therefore, the demandant had put himself on the great assise, and the tenant had suspicion that the ancestor was not really seised at the time mentioned in the count; as perhaps he was not born, or was dead at the time; he used to pray that the time of seisin might be inquired of by the

[a] Vid. ant. 264.

recognitors:

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recognitors: and to obtain the favour of this extraordinary inquiry, it was the practice for the tenant to give something, *dare de ſuo*, as Bracton calls it; this being, probably, a remnant of the old cuſtom of putting juſtice to ſale; an abuſe which was long permitted and made a gain of by our kings, and was at laſt provided againſt by a clauſe in the famous chapter of the Great Charter[s]. To prevent the tenant taking advantage of an error in mentioning the time, the demandant was permitted to correct it, and ſpeak of the time of another king; and this was allowed in any ſtate of the cauſe till the tenant had anſwered, and put himſelf on the great aſſiſe, or defended himſelf by duel; but not afterwards could the queſtion of time be moved by the tenant[t]. The ſeiſin was required to be *tempore pacis*; becauſe, during wars, like thoſe in the time of king John and the preſent king, many perſons were violently diſſeiſed, and afterwards, in time of peace, were reſtored to their own property.

When the count was thus founded, the demandant was to offer to prove it, as was before mentioned; which offer was ſometimes ſtated more fully: *Offert diſrationare*

[s] Vid. ant. 249. It is to be lamented that our author, who has opened to the modern reader ſo many ſecrets of our old juriſprudence, ſhould be leſs explicit on a point that has cauſed much difficulty amongſt lawyers. *The tender of the demi-mark*, as it was afterwards called, is the practice here noticed; but this is done ſo ſhortly as to throw no light upon it; and, unhappily, the paſſage is ſo obſcured by the uſe of a word, and that a technical one, in two ſenſes, that it is difficult to make out any meaning at all. Having uſed the word *mentis* to expreſs the naming of the time of ſeiſin in the writ, he afterwards uſes it to ſignify the moving the queſtion of ſeiſin by the tenant: *Dat aliquando tenens de ſuo pro habendâ mentione de tempore.* Perhaps ſome reaſon might be given in thoſe times, to ſhew that the king might accept this tender of money for a judicial grace, without violating Magna Charta. This perhaps might be thought to ſtand on the ſame footing with the king's ſilver, which is ſtill given *pro licentiâ concordandi.* The truth is, that the charter only aimed at flagrant and enormous partiality when obtained by corruption, and not at ſuch trifling payments as were made and accepted of courſe from every body, as a moderate recompence to the officers of the court for their labour and attendance.

[t] Bract. 373.

*per*

*per corpus talis liberi hominis ſui, et talis nomine, qui hoc paratus eſt diſrationare per corpus ſuum, ſicut ille qui hoc vidit,* or *de viſu patris ſui cui pater ſuus cùm eſſet agens in extremis injunxit in fide quâ filius patri tenebatur, quòd ſi inde loqui audiret* (as before mentioned) *quòd inde teſtis eſſet; et hoc per corpus ſuum diſrationare ſicut illud quod pater ſuus vidit et audivit.* If any of the above circumſtances were omitted, and the proceeding had gone too far to correct the error, the demandant would loſe his claim for him and his heirs for ever.

ANOTHER material part of the count was, the deducing the deſcent from the anceſtor ſeiſed down to the demandant. This was plain and eaſy, when the deſcent was in the right line; but when it was neceſſary to go over to the tranſverſe, or collateral line, it became more difficult: then, inſtead of deducing it from father to ſon, a tranſition muſt be made in this way: *Et quia idem talis obiit ſine hærede de ſe, revertebatur jus terræ illius tali ut avunculo et hæredi, &c.* And in this it was neceſſary to obſerve, that the *ſtipes* reſorted to did not exceed the time of limitation before mentioned. If a ſon died in the life-time of his father, it was the opinion of ſome, that he need not be mentioned in the deſcent; but Bracton does not aſſent to this, laying it down as a reaſon, that no right deſcended to an heir from an anceſtor, unleſs by the death of ſome heir; and he thought that ſuch deceaſed heir ſhould be noticed in this way: *Quòd de tali anteceſſore deſcendere debuit jus tali ut filio et hæredi, et de tali ei qui nunc petit*[t] *ut nepoti et hæredi;* ſo that no chaſm would be left in the deſcent: for if that was allowed, then a ſon might be attainted of felony in his father's life, and, being left out of the computation of deſcent, the grandchildren would ſucceed immediately; which, as Bracton ſays, would be inconvenient,

[t] Brac. 374.

and

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and againſt law. However, when the eldeſt ſon died in the life of his father, leaving no children, but leaving brothers, then it was not neceſſary to mention ſuch eldeſt ſon in the computation of the deſcent, though the right ought to deſcend to him; as well becauſe the other brothers were as near in degree to the ſeiſin of the father as the brother who died, as becauſe, upon his death, the eldeſt of the ſurviving brothers became next heir to the father; on which account the attainder of ſuch elder brother, in the life-time of the father, would not affect the other brothers, who were not heirs to him during the father's life.

WHERE an abbot, prior, or other incorporated perſon, ſued a writ of right, in right of his church, grounded upon the ſeiſin of a predeceſſor, there was no need to count from one abbot to another, naming the intermediate ones; becauſe the corporation remained the ſame, notwithſtanding the changes of the abbots[u]. They therefore only ſaid, *talis abbas, predeceſſor ſuus, fuit ſeiſitus, &c.* If land was given to more than one jointly, the parties ſhould all be named in the computation of the deſcent, thus: *Et unde A. B. C. D. fuerunt ſeiſiti, &c. et ita quòd tales mortui fuerunt ſine hærede de ſe, accreverunt eorum partes ſuperſtitibus, et ita quod jus terræ illius deſcendit hæredibus eorum, qui fuerunt ſuperſtites, ſcilicet talibus; et quia unus illorum, ſcilicet talis, obiit ſine hærede de ſe, deſcendit totum jus tali, et de tali illi qui nunc petit, &c.*

IF any one was omitted in the deſcent; if it commenced with one who never was in ſeiſin; if there was any error in the perſon, or the name of any one mentioned in the deſcent; if any of thoſe mentioned in the deſcent was a villain; in all theſe caſes, the action would abate, and the demandant loſe his ſuit[x].

[u] Bract. 374. b. Vid. ant. 397. [x] Ibid. 375.

WHEN

When the count was thus exhibited, it became the tenant to conſider what defence he could make. The firſt point to be conſidered was, whether the court had juriſdiction of the cauſe; next, whether the parties to the writ were proper; and then, whether the writ was liable to any exception. The next conſideration was, whether the tenant held all the land demanded, or only part, and how much: to aſcertain this, the tenant might pray *a view*. When this was over, then the tenant was to anſwer to the merits of the cauſe, either by himſelf or attorney, unleſs there was ſome *warrantor* whom he ſhould like to *vouch*. The nature of vouching to warranty, and the anſwers the tenant might make, we ſhall defer for the preſent, till we have inquired a little into the method of praying and making *a view*, and the caſes in which it was allowed [y]. Defence.

A view might be had either by the party or by the jurors. Of the latter, ſomething has already been ſaid in the aſſiſe of novel diſſeiſin. A view might be had alſo ſometimes in inquiſitions; and not only where it was a queſtion for the recovery of property, but alſo where it was intirely upon a fact, as in caſes of treſpaſs. What we have now to ſay, will be confined to *a view* when prayed by the party, and granted for the purpoſe of enabling the court to paſs a certain and preciſe judgment on the matter before them. In order to underſtand this, we ſhall firſt ſpeak of caſes where *a view* was not allowed; then of thoſe where it was; and laſtly, of the manner of making it. Of granting a view.

In a plea *de proparte ſororum*, if the demand of the *rationabilis pars* was by a writ of *nuper obiit*, that is, by ſtating that the demand was of a certain portion of the inheritance, of which their common anceſtor *lately died ſeiſed*; the latter part of the allegation was conſtrued to ſpecify the parcel of land ſo accurately, as to ſuperſede the

[y] Bract. 376.

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neceſſity of *a view*[z]; but if land was demanded by a writ of right *ut de proparte*, then *a view* was allowed. For the ſame reaſon *a view* was denied in dower, if brought for land of which the huſband *obiit nuper ſeiſitus*. If a manor was demanded without the *pertinentia*, no view was allowed, a manor being ſufficiently defined by the name only: ſo if the demand was of the moiety of a manor undivided; becauſe the demandant being ignorant which moiety belonged to the tenant, could not inform him of the particulars on taking the view. But if it was divided, and the *pertinentia* were claimed, there a view would be granted; and, in any caſe, if the manor was undivided, he might have a view of the whole. A view was denied to an *intrudor*, if the thing in which the intruſion was made, was ſpecified without the *pertinentia*; or if that was done, which was held to ſuperſede the need of a view, as before mentioned; eſpecially if the intruſion was ſo recent, as within a year or leſs. If a woman demanded dower of a manor, of which ſhe was ſpecially endowed, without naming the *pertinentia*, ſhe could not have dower; ſo if ſhe demanded *tertiam partem*; altho' ſhe could not aſcertain her third part, yet in this latter caſe, the tenant might have a view of the whole: however, if the woman replied that ſhe demanded the third of that of which her huſband *nuper obiit ſeiſitus*, and that the tenant held the whole, no view would be allowed, for the reaſon above given. If the demand was made in an uncertain way, no view would be allowed; as demanding all the lands holden by the tenant in ſuch a vill over and above ten acres[a]: though here, as in a former caſe, he might have a view of the whole. When a tenant had had a view, no warrantor whom he introduced into the action could have it; the warrantor knowing by his charter what land he was to warrant, without the aſſiſtance of a view.

[z] Bract. 376. b. [a] Ibid. 377.

If a view had been refuſed, or had not been prayed; yet when the duel was waged, and pledges given, the two champions might and ought to have a view, becauſe, by law, they were to ſwear *de viſu*; a day therefore uſed to be given them for that purpoſe. After land had been taken into the king's hands by default, it was not uſual to allow a view; becauſe the tenant, when he demanded it back *per plevinam*, muſt have aſcertained it in the ſame manner as would be done by the demandant on a view: which, therefore, ſuperſeded the need of a view: however, for the ſame reaſon as was before given, the champions were to have a view after a default.

If the demand was made not of land, but of ſome right, as a right of advowſon, of common, and the like; though theſe are inviſible in themſelves, yet as they are iſſuing out of land, the land to which they belonged might be aſcertained either by view, or what amounted to a view. In caſes of common it was ſufficient, if the place was viewed by the jurors; and ſo it was in treſpaſs, and in waſte; for in a perſonal action a view might not be prayed by the party [b].

A VIEW could be had in the following caſes: of all lands demanded in a writ of right, or in any other writ in which the duel or the great aſſiſe might be had: in ſhort, it lay wherever a corporeal thing was demanded, that could not be otherwiſe aſcertained, either directly by the naming of it without any *pertinentia*, or indirectly by a deſcription, as in a *nuper obiit* before mentioned; or by ſpecifications that were adequate; as, *quam talis warrantizavit; talis tenet in eádem villá; talem quæ capta fuit in manus domini regis; talem quam talis tibi tradidit talem, de quâ diſſeiſinam feciſti, talem quam tenes de dono talis.* It lay of incorporeal things, as in a writ of *quo warranto*; which writ, as has been be-

[b] Bract. 378.

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fore mentioned, was both *in rem* and *in perſonam*. It might be had of land out of which a rent iſſued, to which any one had common of paſture, or in reſpect of which ſuit of court was demanded. In all theſe caſes, as well as the former, it might be had, unleſs the neceſſity was ſuperſeded by ſome ſort of deſignation or deſcription that was equivalent to it [c].

If the view was granted, the entry on the roll was to this effect: *A. petit verſus B. tantam terram cum pertinentiis, &c. &c. Et B. venit, et petit viſum de terrâ, unde, &c.* And then there iſſued a writ to this effect, directed to the ſheriff: *Præcipimus tibi, quòd ſine dilatione habere facias B. viſum de tantâ terrâ cum pertinentiis in N. quam A. in curiâ noſtrâ coram juſtitiariis noſtris apud W. clamat, ut jus ſuum, verſus prædictum B. Et dic quatuor militibus, ex illis qui viſui illi interfuerint, quòd ſint coram iiſdem juſtitiariis noſtris apud Weſtmonaſterium, tali die, &c. ad teſtificandum viſum illum; et habeas ibi nomina militum, et hoc breve, &c.* varying according to the form of the original writ [d]; and then *dies datus eſt eiſdem, &c.* On the *dies datus*, the demandant and tenant might both caſt eſſoins; but whether they came or not, the ſheriff was to command the four knights to appear and teſtify their view; and when this was once done, the record of ſuch teſtification muſt be abided by. If no view had been made, and the tenant appeared, and ſhewed it, he might have another day. In making the view, the demandant ought to ſhew to the tenant, in all ways poſſible, the thing in demand, with its metes and bounds.

If the tenant objected, that the demandant had put in view more or leſs than what was contained in the writ, an inquiſition of the country uſed to be made to find the truth [e]. The inquiſition ſometimes conſiſted of four, five, or ſix perſons, whom the parties named, together with

[c] Bract. 378. b. [d] Ibid. 379. [e] Ibid. 379. b.

certain

certain of those who had made the view. For this purpose the following special *venire facias* would issue: *Præcipimus quòd venire facias coram justitiariis nostris, &c. A. servientem talis, & attornatum suum, in loquelâ quæ est inter eundem A. &c. de tantâ terrâ, &c. Et similiter cum eo B. C. D. E. super quos prælicti tales se posuerant, et præterea quatuor ex illis qui visui interfuerint, quem prædictus A. attornatus petentis fecit tenenti de prato, &c. ad certificandum præfatis justitiariis quid et quantum prati, &c. idem attornatus posuit in visu, et unde idem tenens dicit quod non posuit in visu, nisi tantum, &c.*

When the tenant was thus informed of the quantity of land which the demandant claimed, he was better able to calculate his defence, whether to take it on himself by pleading any exception, or, if he had any warranty, to vouch a warrantor to defend for him [f].

Vouching to warranty.

If the tenant had no good cause of exception, either dilatory or peremptory, and had any one to vouch, it would be safer to vouch his warrantor to defend for him. This was to be done by the aid of the court, or not, according as the warrantor was, or was not, within the power of the tenant [g]. A clause of warranty was usually inserted in every charter, whether made on the occasion of a donation, a sale, or exchange of any land or tenement: sometimes a warranty arose by reason of homage, without any charter at all. As a warranty was usually made for the warrantor and his heirs to the donee and his heirs, the mutual tie continued on the heirs *in infinitum* on both sides; so it did on the assigns, and those who were *in loco hæredum*, as the chief lord, who came into seisin by reason of escheat [h]. A tenant for life, as well as one in fee, and even one who held for term of years, might either vouch or be vouched. A husband might vouch his wife; and, in case of a gift

[f] Bract. 382. [g] Ibid. [h] Ibid. 382. b.

made

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made by her to him before marriage, if he loſt, ſhe was bound *in excambium:* the ſame, if the wife was impleaded of land given to her before marriage by the huſband [i].

If a minor was vouched, the tenant was expected, at the time of vouching, to ſhew the deed containing the warranty. This was to take off the ſuſpicion of its being meant for delay, the vouching of minors being often reſorted to for no other purpoſe than that of delay. When the charter was ſhewn, and the queſtion was upon a ſervice, it was enquired, whether the minor's father, or any of his anceſtors, was ſeiſed of the ſervice *anno et die quo fuit vivus et mortuus:* if he was, then the minor was immediately to enter into the warranty, but the plea between the demandant and him was to remain *ſine die* till he was of age; for he was not obliged to anſwer, either to the warranty or the plea, till he was of age. But if the tenant had been enfeoffed of the land in queſtion during the minority, the minor was to anſwer both to the warranty and the plea: and in order to know this, an inquiſition would be made, whether it was an inheritance by deſcent or by purchaſe. What is ſaid above of ſervices applied alſo to homage [k].

Nature of warranty.

The obligation of warranty that aroſe from homage might, as was before ſaid, be proved without a deed. If the vouchee called for one, the tenant need only ſay, "You "are bound to warranty, becauſe *ego ſum inde homo tuus*, "and you have received my homage for this land, and are in "ſeiſin of my ſervice, and my father and his anceſtors *inde* "*fuerunt homines anteceſſorum tuorum;*" of which he was to produce a ſufficient *ſecta*, or ſome one who was ready, if neceſſary, to prove it *per corpus ſuum:* and if, upon the denial of the vouchee, this was afterwards proved before the juſtices, they would adjudge him to enter into the

[i] Bract. 381. [k] Ibid. 381. b.

warranty.

warranty. Altho' the tenant might at any time make the surrender of his tenement, yet the lord could not wave the homage, becauſe by ſuch means he might, at the expence of a ſmall ſervice, deprive the tenant of the claim of warranty which depended upon the doing of homage. If the warranty was grounded on a fine and cyrographum, it is made a doubt by Bracton, whether a minor ſhould not be bound to anſwer, though his anceſtor was not ſeiſed *die et anno*, as above mentioned. But of this more hereafter.

A WARRANTY was ſometimes conceived ſo as to bind not only the perſon of the feoffor, but alſo a certain tenement. Thus in the deed of gift he might ſay, that he and his heirs would warrant the gift *ex tali tenemento quod tunc tenet*, to whomſoever that tenement might afterwards come; by virtue of which ſpecial warranty that tenement, in whatſoever hands, would be liable to go *in excambium* of the land warranted. But the law was ſo favourable to warranty, that, without ſuch expreſs ſpecification, land was held to be tacitly bound by a warranty; and therefore, if a warrantor at the time of making his warranty [l] had ſufficient to make good his warranty, the land he then had became bound by the warranty; and even if it went into the hands of the chief lord, or of the king, by eſcheat, Bracton holds [m] it to be liable to the warranty, *quia res cum onere tranſit ad quemcunque*.

THE king, in point of law, was liable to warrant, the ſame as a common perſon; but he could not be vouched, becauſe no ſummons could iſſue againſt him: inſtead, therefore of vouching, the tenant ought to ſay, in the ſtile of a remonſtrance, that *ſine rege reſpondere non poteſt, eò quòd habet chartam ſuam de donatione, per quam, ſi amitteret, rex ei teneretur ad excambium*. It ſeems, that ſuch reſpect was paid to the king's charter, that an allegation thereof was held ſufficient cauſe to delay the proceeding. To re-

[l] *Satis habet.* [m] Bract. 382.

medy

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medy this, it had been lately provided, that the king ſhould never be named in this way, unleſs where he was bound *ad excambium* [n].

In vouching, the tenant ought to name the warrantor with all poſſible preciſion. Thus, if he was ſon as well as heir, he ſhould be called ſon and heir. If many claimed to be heirs, they ſhould be vouched disjunctively, *talis vel talis*, whoever of them was heir. If the heir was *in ventre*, and the wife had prayed to be put into poſſeſſion *nomine ventris*, as ſeems to have been uſual, then the tenant was at liberty either to name the perſon who was apparent heir, or him *in ventre*, ſtating in all ſuch caſes the ſpecial ground of ambiguity [o].

If a perſon was vouched who was in the power of the tenant, as a wife, children, or others under his authority, the tenant was not to have the aſſiſtance of the court; but if he did not produce the vouchee, he was to loſe his land. If the vouchee was not in the realm, he was not within the reach of the king's writ, and therefore it would be in vain to pray the aſſiſtance of the court; and if the tenant did not produce ſuch warrantor, he would loſe his land: but if the perſon vouched was in Ireland, the king's writ uſed to iſſue to the juſtices there [p]. If the vouchee reſided within the power of the king's writ, and he could not be produced without the court's aſſiſtance, then there iſſued a writ to this effect, addreſſed to the ſheriff: *Summoneas per bonos ſummonitores A. quòd ſit coram juſtitiariis noſtris, &c. tali die ad warrantizandum B. tantum terræ cum pertinentiis in tali villâ quam E. in eâdem curiâ coram iiſdem juſtitiariis, &c. clamat ut jus ſuum verſus prædictum B.*

[n] This proviſion is ſaid by Bracton to be made *coram ipſo rege in dedicatione abbatiæ de Hayles in præſentiâ novem epiſcoporum, et coram comete Richardo et aliis pluribus comitibus.* This, therefore, was an act of the legiſlature, and is one of thoſe many acts of parliament which are now loſt. The date of this proviſion is not mentioned.

[o] Bract. 382. b.

[p] Ibid. 395. b.

*et*

*et unde idem B. in eâdem curiâ noſtrâ coram iiſdem juſtitiariis noſtris vocant ipſum A. ad warrantizandum verſus prædictum E. &c.*

THE writ of ſummons *ad warrantizandum* always made mention of the ſort of plea depending. If the warrantor was a minor, there was a writ of ſummons to the guardian to appear, and bring with him the heir. If an heir was vouched in reſpect of his mother's land, which was then in poſſeſſion of his father as tenant *per legem Angliæ*, the warranty was not deferred, but a writ iſſued to him, expreſſed either to hear the judgment of the court on the warranty, or to warrant together with the heir [q].

AT the return of the ſummons, the demandant, tenant, and warrantor, might all eſſoin themſelves. If the demandant made default, and the tenant appeared, the tenant had judgment to go quit; if the tenant, then there was a *capiatur in manus domini regis*, as in common caſes. If the demandant and tenant both appeared, and the warrantor made default, then a writ of *capias ad valentiam* iſſued to take as much land of the warrantor, as was equal to the value of the land in queſtion. If the land of the warrantor was in another county, the ſheriff of that county could not judge of the value of the land in queſtion: to aſcertain this, therefore, a writ firſt iſſued to the ſheriff of the firſt county, commanding him by the oaths of twelve men of the vicinage *quòd extendi faciat, et appretiari*, the land in queſtion; upon the return of which extent, they grounded a writ of *cape ad valentiam* to the ſheriff in the foreign county [r]. If a guardian made default, the *cape ad valentiam* iſſued againſt the lands of the minor: if either the tenant *per legem Angliæ* or the heir made default, the *cape ad valentiam* went againſt the maternal inheritance in the poſſeſſion of the tenant *per legem*. If there was more than

[q] Bract. 383. b. [r] Ibid. 384.

one

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one warrantor, as in the caſe of parceners, the *cape ad valentiam* iſſued againſt all rateably; though if ſome appeared, they did not ſuffer by the default of the others, who were proceeded againſt ſeparately [s].

THE writ of *cape ad valentiam* contained in it likewiſe a ſummons; and if the warrantor after the caption did not appear to this ſummons neither the firſt, ſecond, third, nor fourth day, and the demandant and tenant both appeared, the former againſt the latter, and the latter againſt the warrantor, then judgment was given that the demandant ſhould recover [t] the land againſt the tenant, by default of the tenant, and the tenant an *excambium ad valentiam* out of the land of the warrantor. Upon this there iſſued a writ for the demandant, commanding the ſheriff *quòd habere facias ſeiſinam;* and another for the tenant *de excambio* againſt the warrantor [u]; which latter was preceded by a writ of extent, if the land was in another county, as in the caſe of the *cape ad valentiam* before mentioned. If the warrantor had appeared, and afterwards made default, then there iſſued a *cape ad valentiam*, which was a *parvum cape*; and if he [x] failed to appear to the ſummons therein contained, the demandant had judgment againſt the tenant by default, and the tenant *ad valentiam* againſt the warrantor, as in the former caſe: and ſo of the perſon or perſons making default, if the warrantor was more than one perſon; though if huſband and wife were ſummoned, and one made default, it was the ſame as if both had ſo done, whether before appearance or after. If the warrantor afterwards appeared, but had no ſufficient excuſe to ſave his default in not appearing at the firſt, ſecond, third, or fourth day, then, in like manner as in the former caſes, the demandant had judgment againſt the tenant, and the tenant

[s] Bract. 385.

[t] *Recuperat terram ſuam verſus B. per defaltam B. et B. in miſericordia, et habeat de terra ipſius C. in loco competenti excambium ad valentiam.*

[u] Bract. 387. b.

[x] Bract. 386.

over

over againſt the warrantor for an *excambium ad valentiam*, upon which iſſued writs of *habere facias ſeiſinam* for both parties [y].

If the demandant and warrantor appeared and offered themſelves, and the tenant was abſent; then, if he had not entered into the warranty, he *ſtatim recedat quietus de warrantiâ*, and a *parvum cape* would iſſue for the land in queſtion; and if upon the return thereof the tenant did not appear, or could not ſave his default, he would loſe his ſeiſin. If the demandant made default, and the tenant and warrantor appeared and offered themſelves, they both *recedant quieti de brevi illo*. When a perſon was vouched, who had no land in fee that might be taken into the king's hands, or by which he might be diſtrained, then a writ iſſued to the ſheriff [z], *quòd habeat corpus*, to take the body.

When the demandant, tenant, and warrantor all appeared in court, the warrantor either entered into the warranty, or contended that he was not bound to warrant. If he voluntarily did the former, the original ſuit then proceeded between the demandant and warrantor, and the tenant might leave the court, till the plea between them was determined. The demandant was therefore to propound his count to the warrantor, in the ſame manner as he before had to the tenant, to which he was to anſwer, and defend the demandant's right by the duel, or great aſſiſe, unleſs he could plead ſome exception, or had a warrantor, whom he in his turn might call to defend him; and thus they might go on, one warrantor vouching another, till none was left to be vouched: and if the laſt warrantor loſt, either by default or by judgment, he would be liable *ad excambium*, and ſo on from hand to hand to the tenant.

If the warrantors were *C. D.* and *E.* and *E.* had nothing wherewith an *excambium* could be made, and all the

[y] Braſt. 386. b. [z] Ibid. 387.

others

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others had sufficient, Bracton thought it hard that the tenant should go without an *excambium*; and therefore, in his opinion, it appeared equitable that *D.* should, notwithstanding, recompense *C.* and wait for better times, when *E.* could do the same by him; so that the writ of seisin would run: *Et quia E. nihil habet unde excambium facere possit ipsi D. ideo de terris ipsius D. in ballivâ tuâ eidem C. excambium ad valentiam prædictæ terræ, sine dilatione habere facias, donec idem E. aliquid habeat unde excambium facere potest, et illud idem excambium sine dilatione habere facias prædicto B. &c.* the same was also done, if any of the intermediate warrantors were unable to make an *excambium*. If the last warrantor could satisfy only in part, the remainder was to be supplied by the intermediate warrantors, observing the order in which they were vouched.

If a person had infeoffed several, at different times, and was vouched by them all, and lost, without having sufficient to make an *excambium* to each, they were to be satisfied according to the priority of their feoffment. This is supposing that judgments were given in all the pleas in one day; for if they were at different times [a], those who had the first judgment should be preferred; and if they exhausted the property of the warrantor, those who came after, says Bracton, must wait for better times; for the warrantor, if he had nothing, was not therefore discharged: but any thing which might afterwards come to him by descent from the ancestor, by reason of whose warranty he was vouched, would be liable to be taken *in excambium*.

Should the person vouched, instead of entering voluntarily into the warranty, contend that he was not liable to be called upon, it lay with the tenant to make out the title by which he vouched.

[a] Bract. 388.

The

THE grounds upon which warranty might be founded have already been conſidered in part; to thoſe may be added the following: One great ground of warranty was a common gift of land by the words *do* or *dedi*; for it is laid down by Bracton, that, in all charters *de ſimplici donatione*, the tenant was intitled to a warranty from the donor and his heirs, unleſs ſome clauſe was inſerted, ſpecially declaring that the donor or his heirs ſhould not be bound to warranty, or to make an *excambium*. A charter of confirmation, if it contained the word *do*, as it uſually did, *do et confirmo*, in like manner bound to warranty; becauſe it was in effect a *ſimplex donatio*, as well as a confirmation[a].

MANY were the exceptions which might be ſtated by the perſon vouched to ſhew he was not bound to warrant. In the firſt place, he might avail himſelf of any error in the writ of warranty; but he could not have a view. If the warranty was grounded upon a charter, he might ſhew that the charter had ſuch defects, as to be of no validity in law; of which more will be ſaid hereafter. If no exception lay to the charter, he might except to the gift. Thus he might ſay, that the donee had not ſeiſin in the life of the donor[b]; that the donor was never ſeiſed; that the tenant was not heir to the feoffee; that he was not ſuch an heir as is deſcribed in the original gift; that he was one of thoſe perſons who were expreſsly excepted in the warranty.

A WARRANTY was with reaſon held not to bind a perſon to defend the feoffee againſt the ſeoffee's own tenant, but only againſt ſtrangers who might claim any right before the firſt feoffment. If a perſon had recovered an *excambium*, where he had loſt upon an act of his own, and

[a] Sometimes there was a ſpecial charter, expreſſing that the donor, notwithſtanding the homage, ſhould not be bound to warranty, or to make *excambium*.

[b] Bract. 389. b.

[c] Ibid. 390.

had

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had no lawful title to recover againſt his feoffor, as in the foregoing caſe, the feoffor had a ſpecial writ to obtain reſtitution of the land ſo wrongfully recovered[e]. Where a warranty was extended to the heirs and aſſigns, the aſſigns had an option, whether they would vouch the feoffee or the firſt feoffor[f].

If the warrantor happened to die, the principal action was not abated, as it was by the death of either the demandant or tenant; but the warranty was ſuſpended for a time, as in the caſe of a minor. We have before ſeen, that where the anceſtor died ſeiſed in fee, the minor was bound to anſwer the warranty; and Bracton lays it down poſitively, that if in ſupport of the warranty the tenant produced a cyrographum, or fine, made by the warrantor to the tenant, the warrantor was obliged to anſwer though a minor; although he need not anſwer if it was grounded on a common charter, on homage, or on ſervice done. But yet, as to the demandant, he ſhould have his privilege not to anſwer till he was of age; unleſs, indeed, where his anceſtor did not die ſeiſed in fee[g]. If the warrantor died at any time before judgment paſſed between him and the demandant, the plea did not abate, but the heir of the warrantor, whether a minor or not, was to be vouched; and if the warrantor had loſt by judgment, but had not made an *excambium*, and died, the heir was to make the *excambium* without any other writ being ſued[h].

There were inſtances where a perſon might enter into a warranty, though he was not vouched. This was not in defence of the tenant's right, but of his own: as if a perſon was tenant for life, or in dower of land which was to revert to the tenant in fee, and the tenant in fee perceived that ſuch tenant permitted himſelf to be impleaded, and omitted to vouch the tenant in fee to defend; in

[e] Bract. 391. b.
[f] Ibid. 391.
[g] Ibid. 392.
[h] Ibid. 392. b.

ſuch

ſuch caſe, the reverſioner, ſeeing the danger his title was in, might appear unvouched, and enter into the warranty to defend his own right. It was conſidered as the duty of every tenant for life, if impleaded for the land he held, to vouch his warrantor to defend [i].

When the perſon vouched after conteſting the point, was adjudged to enter into the warranty, the demandant was to recommence the principal action againſt him, propounding his count, as againſt the tenant, with the additions which the change of perſons and circumſtances required; as *quòd injuſtè intrat in warrantiam, quia terra de quâ agitur eſt jus ſuum, quia talis anteceſſor ſuus, &c.* The plea therefore went on between the demandant and warrantor; and this was the time for the warrantor to vouch over any perſon to warrant him; upon which a ſummons *ad warrantizandum* would iſſue ſimilar to that beforementioned. If he had none to vouch, or choſe to vouch none, then he either defended the right and ſeiſin of the demandant *per corpus liberi hominis*, or put himſelf upon the great aſſiſe, unleſs he had any exception to plead. Of theſe, ſome were common both to the tenant and warrantor; ſome belonged only to the tenant, and ſome only to the warrantor. No exceptions that had been made by the tenant, and over-ruled, nor any which he had waived, could be pleaded by the warrantor [k]. If the warrantor ſucceeded either in his defence *per duellum*, or by the great aſſiſe, or in any exception he propoſed, the tenant remained in his ſeiſin, and the demandant was *in miſericordiâ:* if he failed in either, the tenant loſt his ſeiſin, and the warrantor, as before mentioned, was bound *ad excambium.*

Respecting the *excambium*, or recompence in value, it is clearly and repeatedly laid down by Bracton, that no more could be demanded than the warrantor poſſeſſed by deſcent from the original warrantor; ſo that property *ex*

[i] Bract. 393. b. [k] Ibid. 394.

*parte*

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*parte maternâ* was not liable to make good a warranty *ex parte paternâ*, and *vice versâ*. In no case, was land taken by purchase at all liable[l]; nor was a person bound to warranty beyond the value of the land at the time of the donation. Judgment for the *excambium*, with the writ of seisin, and, where necessary, that of extent, have already been considered.

Proof of Charters.

Before we dismiss the subject of warranty, it will be proper to consider two points, which were very intimately connected with it: these are the manner of proving a charter, and the proceeding by *warrantia chartæ*. If a charter was produced, and the person vouched denied the writing, the seal, and the gift, then the person producing it might maintain the gift to be lawful, and the charter to be valid; and, *inde ponit se super patriam, et testes in chartâ nominatos*. Upon this, a writ issued to the sheriff, commanding him to summon *A. B. C. testes in chartâ nominatos quam D. in curiâ nostrâ coram justitiariis nostris profert, &c. et præterea duodecim tam milites quàm alios legales, &c. ad recognoscendum super sacramentum suum, si prædictus, &c.*[m]. If the witnesses lived in different counties, different writs issued; but the *milites* always came from the county where the land lay.

Suppose the writing and seal were admitted, but the validity of the charter was questioned, because made while the donor was *non sanæ mentis*, or under age; or because extorted from him by force and fear while under restraint; or because obtained through deceit, being a feoffment in fee, when a term only was intended to be granted; in all these cases, it lay upon the person producing the charter to prove the contrary. Sometimes the inquisition was made by the witnesses alone, and sometimes by strangers without the witnesses, according as the parties

[l] Bract. 394. b.

[m] Bract. 396.

chose.

choſe [o]. In the latter caſes, there was always a clauſe in the writ directing that they ſhould view the land. Some of theſe inquiſitions were to be taken before the juſtices of the court where the ſuit depended; ſome before the ſheriff, and the *cuſtodes placitorum coronæ*. If the witneſſes and recognitors did not appear in court at the day, another writ iſſued to the ſheriff, beginning thus: *Bene recolimus* ALIAS *tibi præcipiſſe quòd, &c.* and concluding with this injunction and caution: *Et ita te habeas in hoc negotio, ne nos ad te graviter capere debeamus* [p]. The writ of *venire* always ſtated the iſſue which was to be tried, and was, therefore, as various as the matter which might become the ſubject of ſuch inquiry.

When the witneſſes and recognitors appeared in court, the witneſſes having taken their oath, declared that they were preſent when the gift was made, and that the charter of donation was read and heard, homage accepted, and ſeiſin lawfully given to the donee in their preſence, with all due ſolemnity. Upon this the charter was pronounced to be valid, and the gift good in law. If they ſaid, they had only heard that ſuch a charter was made, and homage accepted, but were actually preſent when ſeiſin was given, and the donee entered; this alſo was held ſufficient to prove the gift good: and if they ſaid, they were preſent at all the other circumſtances, but they knew nothing of the ſeiſin, then the charter was proved, but the gift was invalid. If, ſays Bracton, the witneſſes ſaid they were preſent at the making of a note or memorandum to which both parties aſſented, this was held ſufficient to prove the charter, though they were not preſent at the writing or ſigning of it.

If all the witneſſes were dead, or out of the realm, ſo that none appeared to give teſtimony to the truth of the

[o] Bract. 396 b. [p] Ibid. 397 b.

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charter; then, of neceſſity, as in other caſes, recourſe muſt be had *ad patriam* [q].

YET Bracton ſays, that a charter might be proved in other ways than *per teſtes et per patriam*. The ſeal might be compared with another ſeal of the ſame perſon, which had been produced and proved in court, or acknowledged by him. If, upon compariſon of the ſeals, there appeared an agreement between them, this amounted to a proof of the deed, unleſs the charter carried upon the face of it ſome circumſtances of manifeſt ſuſpicion; as raſure in any part which contained the fact of the charter; for as to that which contained the law of it, that, as in writs, was not ſo material; for *jura*, ſays Bracton, *ubiq; ſcribi poſſunt*. A diverſity of hands, or of ink, raiſed only ſlight preſumptions, that might be done away by the teſtimony of the witneſs or the country [r].

*Warrantia chartæ.*

THE proceeding by *warrantia chartæ* was this: If a man was diſtrained by the chief lord to do greater ſervices than were expreſſed in the charter of donation; this not being a plea concerning the right of the land itſelf, he could not have any remedy by vouching his warrantor, but he might ſummon him by the following writ: *Præcipe tali quòd ſine dilatione* WARRANTIZET *tali tantum terræ, &c. quam tenet, et de eo tenere clamat, et unde* CHARTAM *ſuam habet, ut dicit. Et niſi fecerit, et talis fecerit te ſecurum de clamore, &c.* Upon this there lay one eſſoin; and if he neither appeared nor eſſoined himſelf, there followed the proceſs of attachment, the courſe of which will be particularly mentioned hereafter. When he appeared, he might conteſt the warranty, in the like manner as in caſe of a voucher. The above writ was the uſual remedy where the tenant was vexed by the ſuperior lord, who was paramount the warrantor; but where the warrantor exacted ſervices,

[q] Brac. 498. [r] Ibid. 498 b.

againſt

againſt the tenor of his own charter and warranty; ſome thought that a writ of *warrantia chartæ*, being for an injury, was not a proper remedy againſt his own lord, but that the proper remedy was by the writ *de recto de ſervitiis et conſuetudinibus*, which would lead to the duel, or great aſſiſe: however, according to the opinion of Bracton, this action *de injuriâ* was the proper courſe againſt one, who had attempted to oppreſs and deſtroy the perſon whom he was bound by his own ſolemn engagement of warranty to defend[t].

PERHAPS the tenant had no perſon whom he could vouch to warranty; or he might decline vouching, and would rather put in his exception or plea, ſtating ſuch matter as would either defeat or ſuſpend the demandant's action. The different exceptions that might be alledged by a tenant are diſcuſſed at length by Bracton, from whom may be collected a ſhort ſyſtem of pleading, as underſtood and practiſed in his time.

Of pleading.

PLEAS, or exceptions, as Bracton terms them, were of two kinds, dilatory and peremptory. Again, of dilatory pleas, ſome were peremptory as to the juriſdiction, but only dilatory as to the action. The order of ſtating exceptions, or of pleading, was firſt to the juriſdiction, next to the perſon of the plaintiff, then to the perſon of the defendant, next to the writ[u]. Yet Bracton ſays, that ſome lawyers did not adhere to this order, but thought that they might plead a latter plea firſt, and with a proteſtation ſave the benefit of a former, which they might plead afterwards, if neceſſary. It was agreed, however, that a defendant might plead more than one dilatory plea; but he could plead only one that was peremptory as to the action. A plea might be proved many ways; by an inſtrument, *per patriam*, or by an inquiſition, ſays Bracton, conſiſting of impartial unſuſpected perſons, being neither acquaintance[x]

[t] Bract. 399. [u] Ibid. 390. b. [x] *Familiares et domeſtici.*

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nor domeſtics of the party; for which reaſon it could not be proved by a *ſecta*, which might conſiſt of the party's acquaintance or domeſtics; and on that account a *ſecta* was never eſteemed as a proof, but only as inducing a ſlight preſumption, which might be done away by a proof to the contrary, and by a defence *per legem*[y].

JURISDICTION, or the authority of deciding between the parties to the ſuit, depended in general upon the maxim of the civil law, that *actor ſequitur forum rei*; but this was controuled by a variety of exceptions. Thus matters relating to matrimony and teſtaments belonged to the ſpiritual court; matters of freehold and crime belonged to the king's courts. It was no uncommon thing, in theſe times, as has been ſhewn before, for a perſon to bind himſelf ſpecially to be ameſnable to a certain court, or ſuch court as the plaintiff ſhould pleaſe to ſue in. This was a voluntary renunciation of juriſdiction that was binding on the party ſo contracting.

WE have already ſeen the controverſy which was maintained by the clergy in favour of the ſpiritual juriſdiction; and it ſeems, that in the time of Bracton many had no ſcruple to contend, that clerks were not bound to anſwer before a ſecular judge in any plea whatſoever, whether of freehold, contract, or crime: but that venerable author, who has been ſo unjuſtly accuſed of a prepoſſeſſion in favour of the civil and canon law, declares it as his opinion, in oppoſition to ſuch notions, that they were ameſnable in all pleas civil or criminal, except only in the inflicting of a criminal ſentence which affected life and limb; for there, though the ſecular judge had the cogniſance, the execution was to be in the ordinary. Yet, as is obſerved by Bracton with ſome indignation, the practice was otherwiſe; for in capital offences the ordinary uſed to aſſume the cogniſance,

[y] Bract. 400. b.

as

as well as the execution [z], notwithſtanding he was bound by the canons not to judge in matters of blood [a].

Of prohibitions.

When a ſuit was commenced in the ſpiritual court for a matter which was properly cogniſable at common law, the party ſo wrongfully ſued might, as we have already ſeen, have a writ of prohibition to reſtrain the judge and party from proceeding further; the boundary, therefore, of theſe two juriſdictions is to be aſcertained by a knowledge of the caſes in which writs of prohibition were or were not allowed. This point was but ſlightly touched by Glanville, who confines what he ſays intirely to one or two writs [b]; but the ſubject of prohibitions is treated very fully by Bracton.

We find that a prohibition lay for a patron, not only where the rectors litigated a queſtion concerning the whole tithes of the church, but alſo where the ſuit was for a part of them as low as to the ſixth part of the value of the advowſon, but not lower; any thing leſs than this being permitted to be determined finally by the ſpiritual judge [c]. There are many writs of prohibition for the maintaining of the king's rights during the cuſtody of the temporalities; the pope and his partiſans endeavouring to encroach on theſe ſecular claims, either by refuſing clerks who were preſented, or by other marks of oppoſition [d]. There is a writ of prohibition to ſtop a ſuit inſtituted againſt a bailiff of the king who had arreſted a clerk for a felony or ſome other crime. If a ſuit was inſtituted in the eccleſiaſtical court to eſtabliſh the legitimacy of children, with view to a claim to hold *per legem Angliæ*, a prohibition lay, becauſe that court could not judge of legitimacy *quoad hæreditatem et ſucceſſionem*, unleſs a plea was depending in the king's court, and baſtardy was objected; and then the trial uſed

[z] Bract. 401. b.
[a] Ibid. 407.
[b] Vid. ant. 175.
[c] Bract. 402. b.
[d] Ibid. 403, 404.

to

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to be remitted to the eccleſiaſtical judge, as has been already frequently mentioned. A prohibition alſo lay, if the eccleſiaſtical judge proceeded in an inquiſition of baſtardy, after the death of the plaintiff or defendant[e].

In the following caſes, it is laid down by Bracton, that a prohibition would not lie to the ſpiritual court: in all ſpiritual matters, or thoſe annexed to the ſpiritualty, in matters matrimonial or teſtamentary, or where penance was to be enjoined. Thus, ſays Bracton, in a ſuit relating to any tenement *per pontifices Deo dedicatum*, and ſo held ſacred, as abbies, priories, monaſteries, and their cemeteries; or concerning things *quaſi ſacra*, becauſe annexed to the ſpiritualty, as lands, common, eſtovers, and the like given to a church, *in dotem*, as it was called, at the time of dedication; if the church was ſpoiled of theſe, and a ſuit was brought in the ſpiritual court for reſtitution, no prohibition lay; though this privilege was not allowed, if the lands were *in liberâ et purâ eleemoſynâ*. In one place Bracton expreſſes himſelf as if a ſuit in the ſpiritual court, when for a liberty, a common, and the like, could be maintained only on a *recent ſpoliation*[f]; though in another place he declares, that recent ſpoliation ſhould be tried by aſſiſe[g].

A PROHIBITION would lie to the following ſuits: to a ſuit *de catallis clericorum violenter ablatis*, or for tithes; or for the value of them, if they were ſold[h]; or on an obligation of ſurety for the purchaſe of tithes; or a promiſe of money *ob cauſam matrimonii*, not ſo if the promiſe was of a tenement; to a ſuit for a legacy, claiming it *ut debitum*; or for the legacy of a debt due to the teſtator, and acknowledged and proved to be ſuch in his life-time, becauſe it ſo became a part of the teſtator's goods, which a debt, that had neither been proved nor confeſſed in his life-time, or voluntarily confeſſed ſince, was not. Such a debt could only be eſtabliſhed by ſuit at common law; till when

[e] Bract. 404. b. 405.
[f] Ibid. 408.
[g] Bract. 406.
[h] Ibid. 407.

it

it was no part of the goods, and so could not be bequeathed; it being a rule, first, that actions should not be bequeathed; secondly, that the ecclesiastical judge should not have cognisance of them; and thirdly, that executors should have no action for a debt which was not acknowledged [i] (that is, grounded upon a recognisance or judgment) in the life of the testator. If goods were bequeathed and sued for; the same of houses and edifices in some cities and towns which the testator had purchased, these being made *quasi catalla testatoris*, by his own disposition of them, (though it was otherwise in London, where prohibition would lie); if a *ususfructus* of land, as a term for years, was bequeathed; a *ususfructus* being only a chattel; in all the foregoing cases, no prohibition would lie, in the time of Bracton [k]; for as the spiritual court was in unquestionable possession of causes matrimonial and testamentary, the abovementioned questions, as arising out of a testament or marriage, were thought naturally to belong to the same tribunal. *Illud quod principale est trahit ad se quod est accessorium.*

It is laid down very positively by Bracton, that in a matter purely temporal litigated between two laymen, the jurisdiction of the cause could not be altered by any privilege whatsoever; and he instances the privilege of those who were *cruce signati*, which he considers as an indulgence warranted by no law: he says, that no oath, no *fidei interpositio* [l], no voluntary renunciation of the parties could change the jurisdiction; as the renunciation of the party could have no effect beyond himself, it could not restrain the king in prohibiting a foreign jurisdiction from encroaching on his crown and dignity [m].

[i] *Recognitum.*

[k] Bract. 407. b.

[l] This was a pretence under which causes were drawn into the spiritual court, in the early times of our law, as has been shewn in the former part of this volume. Vid. ant. 164. 165.

[m] Bract. 408. b.

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THE juriſdiction of a cauſe depended either upon the parties and the cauſe of action together, or on the cauſe of action ſingly. Thus, if a clerk ſued a layman, or a layman a clerk, in the eccleſiaſtical court, on a matter purely temporal, a prohibition lay: the ſame, if a clerk ſued a clerk [n]. In theſe caſes it appears, that the cauſe of action was the principal ground of juriſdiction: but the cauſe of action would change its nature from ſpiritual to temporal; and ſo back again. Thus a lay chattel became ſpiritual, when tithed; and when the tithe was ſold, it became again lay. Houſes and other lay fees in cities and boroughs, if bequeathed by will, were, as has been ſeen, conſtrued to be of a ſpiritual nature; but when the will was executed, they again became lay; and ſo of many others [o].

THERE were two writs of prohibition, one to the judge, another to the party; the former run thus: *Prohibemus vobis ne placitum teneatis in curiâ chriſtianitatis, &c.* the latter, *Prohibemus tibi ne ſequaris placitum in curiâ chriſtianitatis, &c.* If the judge to whom the prohibition was directed thought it well founded, he would decree a *ſuperſedeas* of the proceeding; if he doubted, it was uſual to *conſult* with the king's juſtices; to which *conſultation* the juſtices would make anſwer by a writ, ſometimes in their own name, and ſometimes in the king's; as thus: *Dilecto in Chriſto tali. Inſpectis literis veſtris, quas nobis tranſmiſiſtis, et plenius intellectis, (ſine præjudicio melioris ſententiæ) conſultationi veſtræ duximus reſpondendum, quòd ſi res ita ſe habet ſicut in* CONSULTATIONE *veſtrâ nobis expoſuiſtis, videtur nobis quòd in cauſâ iſtâ bene poteſtis procedere, non obſtante regiâ prohibitione* [p]. If no ſuch *writ of conſultation* was ſent, the prohibition remained in force.

IT was not uncommon for the eccleſiaſtical judge to baffle a writ of prohibition by hurrying on the proceſs

[n] Bract. 406. [o] Ibid. 412. [p] Ibid. 405. b. 406.

againſt

againſt the party bringing the writ, and entangling him in a ſentence of excommunication. When a perſon had ſtood excommunicated for forty days, the biſhop uſed to ſend a writ to the king intimating this, and praying the aſſiſtance of the ſecular arm; *invocantes, quòd minùs valet eccleſia in hâc parte, dignetur regia ſupplere majeſtas;* the deſign of which was, that the party ſhould be apprehended. But, upon ſuggeſtion of the fraud, the party might obtain another writ directed to the ſheriff *de non capiendo*, which likewiſe commanded the ſheriff to attach the clerical judge, that he might anſwer to the fraud. Any malicious application of the proceſs of excommunication might be combated in the following manner. If a perſon was rightly excommunicated, and, having continued ſo for forty days, was impriſoned, and tendered ſurety for being forthcoming and anſwering to the ſuit, it ought, ſays Bracton, to be accepted; and accordingly a writ might be obtained, commanding the ſheriff, that if the ordinary maliciouſly refuſed a ſufficient ſurety, the ſheriff himſelf ſhould take it, and order the priſoner to be ſet at large [q].

Attachment *ſur prohibition.*

If, inſtead of the above device, the judge and the party refuſed obedience to the writ, they might both be attached to appear either *coram rege*, or his juſtices *de banco*, or the juſtices itinerant, to anſwer for their contempt. This writ of attachment differed ſomewhat from that uſed on the ſame occaſion in Glanville's time *: inſtead of repeating the prohibition, as it did then, it now began like other writs of attachment: *Si A. fecerit te ſecurum de clamore ſuo proſequendo, tunc pone per vadium et ſalvos plegios B. talem ordinarum, quòd ſit coram nobis*, as the caſe might be, *oſtenſurus quare tenuerit placitum in curiâ chriſtianitatis de laico fœdo ipſius A. in tali villâ contra prohibitionem noſtram. Pone etiam per vadium et ſalvos plegios E. quòd tunc ſit ibi*

[q] Bract. 408, 409.

* Vid. ant. 175, 176.

*oſtenſurus*

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*oſtenſurus quare ſecutus eſt idem placitum in eâdem curiâ chriſtianitatis contra prohibitionem noſtram; et habeas ibi nomina plegiorum et hoc breve, &c.* If the judge and the party lived in different counties, then there were ſeparate writs for each. The proceſs was the ſame as in other perſonal attachments [r], of which we ſhall ſpeak more particularly hereafter.

When the parties on both ſides appeared in court, the plaintiff ſtated his count, or declaration, or, as Bracton calls it, *intentio*, in this way: *Ego A. conqueror de B. quòd me injuſtè vexavit, et gravavit trahendo me in placitum in curiâ chriſtianitatis de laico fœdo meo, ſcilicet, &c. unde damnum ad valentiam, &c.* and to confirm and ſupport his declaration he ſhould add, that he ſhewed the writ of prohibition in full court, and that, notwithſtanding this, they proceeded to examine witneſſes, or to excommunication; and then he ſhould conclude by producing a *ſecta*, conſiſting of two at leaſt, and as many more as he could procure. If the *ſecta* diſagreed in their teſtimony, it was the ſame as if none had been produced; but as this was only a failure of proof, and not of right, the defendants uſed, nevertheleſs, to be enjoined not to proceed in the eccleſiaſtical court. If the *ſecta* agreed, then the defendants were to anſwer; and this might be done ſeveral ways. They might plead, that it was a caſe of ſpiritual cogniſance where no prohibition lay; or they might confeſs it to be temporal, but might, for plea to the plaintiff and his *ſecta*, ſay, that they did not proceed after the prohibition; or that no prohibition was tendered to them; and then each defendant might wage his law *duodecimâ manu*. When law was waged, and pledges given *de lege faciendâ*, a day was given to the parties for making their law; at which day they might eaſt an eſſoin, and have another day by their eſſoiners; at

[r] Bract. 409.

which

which day if they did not come, nor caſt an eſſoin, judgment was paſſed againſt them, and they were obliged to pay damages to the plaintiff.

If they appeared, they were to produce their compurgators, who, like the *ſecta*, might conſiſt of their friends and acquaintance. The *compurgatores* not being required, any more than the *ſectatores*, to be equally impartial with recognitors; it was ſufficient if they were of good report, and in general deſerving of credit; and they needed not be of the ſame rank and condition with the perſon producing them. The words in which *the law was to be made* were to purſue the form of the record: if they varied therein, the defendant ſtood convict; and, if a layman, was committed to jail, as guilty of a miſdemeanor againſt the royal dignity, in the ſame manner, ſays Bracton, as if he had committed a crime of *læſa majeſtas*; if a clerk, then in conſideration of his orders, he was, according to the ſame authority, treated more mildly; though he does not mention the ſort of penalty: the damages uſed to be taxed in both caſes by the juſtices according to the nature of the caſe.

This is the account given by Bracton of the manner of proceeding on a writ of prohibition; and it may be preſumed, that the proceeding in other perſonal writs was exactly ſimilar. When Bracton comes to the ſubject of perſonal actions, he breaks off abruptly without carrying the the reader through the whole proceeding, as he has here through the proceeding on a prohibition. This defect muſt be ſupplied, if poſſible, by what is to be picked up in other parts of his work, and particularly from the proceeding in prohibition which has juſt been related.

Thus far of queſtions relating to the juriſdiction of ſpiritual and temporal cauſes. Many other exceptions might be made to the juriſdiction of the judge. Firſt, it was to be ſeen, whether he had a proper authority: and in

Of juriſdiction.

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in order to aſcertain this, it is directed by Bracton, that the writ by which the juſtice was appointed, after reading the original writ, ſhould be read, unleſs the original writ made mention of his judicial authority. If the judge delegated his authority to another, the proceeding before ſuch delegated perſon would be *coram non judice*. Certain perſons had peculiar privileges in judicial matters. Thus, the Hoſpitallers, Templars, and many others, had the privilege to be ſued no where but *coram ipſo rege, vel capitali juſtitiario*. The citizens of London were not to anſwer to any plea out of the city, except *de tenuris et contractibus forinſecis*. The barons of the cinque ports were to anſwer no where but *apud Shypwey* [s]. It is ſaid by Bracton *, that if a judge was ſuſpected of any partiality, favour, or malice, it ought to be a ground of exception; but this he ſeems to give as an opinion of his own: yet he lays it down as ſettled law, that the juriſdiction of a judge might be declined, upon a real cauſe ſtated; as for conſanguinity to the plaintiff; or being his friend, or companion, or counſel, or pleader to the plaintiff, in the preſent or any other cauſe; or if he was an enemy to the defendant. All theſe are ſtated by Bracton as cauſes of exception to the judge exerciſing his juriſdiction to decide between the parties [t].

When the juriſdiction of the court had been controverted and eſtabliſhed, then was the original writ to be read again, and the tenant was to make ſuch exceptions as the law allowed againſt the form of the writ. The requiſites to conſtitute a legal and regular writ were many. It muſt be adapted to the cauſe of action. Thus, ſays Bracton, if a *magnum breve de recto patens* was brought, when it ſhould be a *parvum breve clauſum*, the writ would abate, though the action remained. Writs ſhould be brought in

Abatement of the writ.

[s] Bract. 411.

* This was a good exception in the canon law, under the name of *Refutatio*. Corv. Ius. Canon. 279.

[t] Bract. 411. b. 412.

their

their proper order. Thus, where a perſon had a cauſe of action that would entitle him to more writs than one, and he brought a writ of right, he could not, generally ſpeaking, afterwards bring an inferior writ to recover the poſſeſſion; though there were inſtances where a demandant had gone ſo far as to pray a view in a writ of right, and afterwards was permitted to ſuſtain an aſſiſe of novel diſſeiſin. A writ failed, if it was grounded on the mode and quality of a fact, when it ought to be grounded on the fact itſelf; as the principal, ſays Bracton, ſhould always be determined before the acceſſary. Thus, as has been obſerved in another place[u], a man diſſeiſed with violence ſhould not bring a writ *quare vi et armis*, becauſe it only went to the quality of the diſſeiſin, and not to the recovery of the tenement diſſeiſed[x].

It was required that a writ ſhould contain in it neither falſity nor error. It ſhould, upon the face of it, appear free from all blemiſh. This ſeems to be required by Bracton more particularly in a writ patent; and whether it was patent or cloſe, it ſhould have no raſure: yet a difference was made between raſures. Thus, if it was in ſtating a fact, the writ failed, for names and facts ſhould be ſtated with fidelity; and if ſuch an error was made either by the chancellor, or by ſome clerk, or the ſheriff, or the attorney, the perſon guilty would, according to Bracton, be *in miſericordiâ* to the king for all his goods, and be liable to be puniſhed as for forgery. If a falſe ſeal[y] was affixed, or even the true ſeal falſely applied, that is, to a falſe writ, this was conſidered as an offence of majeſty; and the offender, if a layman, was puniſhed capitally; if a clerk, he was degraded and rendered infamous[z]. A writ abated, if obtained upon ſuggeſtion of falſehood, or the ſuppreſſion of truth.

[u] Vid. art. 338, 339.
[x] Bract. 413.
[y] *Tanquam falſarius.*
[z] Bract. 413 b.

If

If the demandant or tenant died, the writ abated, and the action too; but if they were more than one, as parceners having one right, then, tho' the writ abated, yet the action survived [a]. If there was any error in the names of persons, in the county, or vill, the writ abated. If the tenant held less than the demandant claimed, the writ failed; not so if he held more. If pending one action the demandant brought another writ for the same cause of action, the second writ abated. We have before said, that the writ abated if the demandant died; it was the same, if being a bishop, or an abbot, or the like, he was deposed; but not if such bishop, abbot, or the like, were tenant in the action; for then the action would only be suspended till a successor was appointed; especially if the action was civil, and not penal [b]: if it was both civil and penal, the action would hold both *ad pœnam* and *ad restitutionem*, as long as he lived; but if he died, whether before or after deposition, the penalty was extinguished with the person; yet an action would lie against the successor for restitution by another writ. A personal writ abated by the death of the tenant, whether such death was civil or natural, but the action survived. A civil death followed upon an entry into religion; and if this was procured fraudulently after the purchase of the writ, it seems it would not abate the writ. If the demandant in his declaration exceeded the limit of the writ, as on a writ of possession to count for the right, the writ abated.

In short, almost all exceptions, says Bracton, which could be alledged, might be properly ranked among pleas to the writ; because, if they went to the action, when the action was determined, the writ was, of course, at an end: whether the action was abated, postponed, or suspended, so was the writ. It was the opinion of some, that all pleas

[a] Bract. 414. [b] Ibid. 414. b.

to

to the writ must be propounded, *simul et semel*, in one day[c]. When the writ was abated by reason of any defect or error, and such defect or error was corrected, it was considered as the same writ and the same action, tho' it was actually another piece of parchment and another seal; and therefore neither the declaration or count, nor the attorney, needed be changed[d].

Pleas to the person.

If the writ was open to no exception, then the defendant was to see if there was any against the person of the plaintiff, so as that he could not at all, or at least not at that time, make his demand. Thus, it might be urged, that the demandant was a *servus*, or a bastard, or *sæculo mortuus*; that he was mad, and *non sanæ mentis*; or born deaf and dumb; or a leper; that he, or some ancestor, had been attainted of felony; that he was a minor. If a person was appealed of felony, he could not bring a civil suit till he had defended himself; nor could a defendant, under such circumstances, be bound to answer. It was a good plea to say, that the plaintiff was in confederacy with the king's enemies, or was in allegiance to the king of France; or to say, that he was excommunicated[e]. It might be said, that the demandant had no right, but as parcener with another; or in right of his wife, so as he could no more sue without her than she without him[f]. Of some of these pleas we shall now speak more particularly.

The plea of bastardy was peremptory; for, if proved, it excluded the demandant for ever from making any claim. It was always required, that the special matters should be stated in the plea; otherwise, there would be an obscurity and doubt, whether the bastardy should be tried by the ecclesiastical court, or not. Thus, having said *nihil juris habes in terrâ petitâ quia bastardus es*, it should go on,

[c] Bract. 415.

[d] Ibid. 415. b.

[e] The leprosy of the mind, as Bracton calls it, like that of the body, as it excluded the unhappy object from the communion of men, so it precluded him from doing any lawful act.

[f] Bract. 415. b. 416.

*quia*

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*quia pater tuus nunquam desponsavit matrem tuam*; or thus, *quia inter patrem tuum et matrem tuam contractum fuit matrimonium illegitimum, ex quo prius contraxit cum quadâm, quæ vixit tempore, quando contraxit cum matre tuâ*; in both which it appears, that inasmuch as the question arose upon the marriage, it must be tried by the ecclesiastical court. But if it was thus, *quia natus fuisti per tantum tempus ante sponsalia vel matrimonium contractum inter patrem tuum, et matrem tuam*; then in such case, as the marriage was admitted on both sides, it is the opinion of Bracton, that the question, whether born before marriage or after[g], might very well be enquired in the king's court.

We have before seen what scruples had been raised by the ecclesiastics upon this question of *natus ante matrimonium*, and what a positive declaration was made by the king and barons in the statute of Merton, passed in the twentieth year of this reign[h]. The matter was not suffered to rest there. We are told, that in the same year the king held a council, consisting of several bishops and lords, and that it was agreed by them all, that whenever the issue of *natus ante matrimonium* arose in the king's courts, the plea should be transmitted to the ordinary; and that an inquisition being made by him in precise words, *utrùm talis natus sit ante matrimonium vel post*, he should send his answer to the king's court in the same words precisely, without any cavil[i]: that in taking such inquisition, all appeal should cease, as in other inquisitions of bastardy transmitted to the ordinary; and particularly, if there should be need of an appeal, that it should not be made out of the kingdom. It was commanded that this should be the practice in future. This regulation intirely precluded the ordinary from giving any judgment on the legitimacy, and confined him to the single enquiry of the fact, which he

[g] Bract. 416. [h] Vid. ant. 266. [i] *Sine aliquâ cavillatione.*

was

was required to certify in the very terms of the iſſue, leaving the king's judges to make their own concluſion upon it; which is preciſely what Glanville lays down as the law upon this ſubject [k]. But, before this proviſion of the council, a practice had obtained, as we have juſt ſaid, of trying this ſpecial queſtion of baſtardy in the king's court. Thus, in the eleventh year of this king, in a writ of mortaunceſtor, the jurors found that the demandant was not the next heir, being born in adultery before marriage. It ſeems to have been conſidered as in the election of the king's judges, whether they would ſend ſuch an inquiſition to be made in the eccleſiaſtical court, or would try the queſtion in their own [l].

It is not, however, improbable, that it depended upon the form of the iſſue, which court ſhould be reſorted to, or finally relied on, for the trial of this queſtion; for if the demandant replied generally *quòd legitimus*, without anſwering to the ſpecial matter, and this obſcure iſſue was ſent to the eccleſiaſtical court, that court would probably certify generally *quòd legitimus*; but this would be ſuch a failure in the eccleſiaſtical court, as to induce the judges to cauſe an inquiſition to be made in the king's court on the ſpecial matter: the ſame, if the reply had met the ſpecial matter, and the eccleſiaſtical court had certified generally *quòd legitimus*; though Bracton ſeems to think, that ſuch a general and obſcure reply to the ſpecial cauſe of baſtardy would paſs for no reply at all, and that the demandant would be barred for want of a replication; and that, if he was a defendant, there would, in like manner, be judgment againſt him for want of a defence.

There were ſome queſtions of baſtardy that would not, under any pretence, be tranſmitted to the eccleſiaſ-

[k] Vid. ant. 118

[l] Bract. 417.

tical judge; as in case of a posthumous [m] or a suppositious child; or where the father had been absent from the mother abroad, so as to leave no presumption of legitimacy, which, however, depended upon the distance and the probability of access [n]. The plea of bastardy would not lie between persons of the same blood, in a possessory action, (though it might between strangers), nor in a plea *de consanguinitate*, any more than in an *assisa mortis antecessoris*, because a question of bastardy between such parties was always upon the mere right, if the inheritance descended from a common ancestor; and so a question of right would be agitated in an action grounded only upon the possession. It might be urged that such a plea was good, by the above rule, because a bastard was in truth a mere stranger as to the true heir; yet Bracton thought not; for it was at least doubtful whether he was not legitimate.

When bastardy was pleaded, and the other party maintained his legitimacy, it seems there was no rule, whether the bastardy or the legitimacy should be proved, except this, that the party who was *extra seisinam* should prove his plea, the person who was in seisin having no need, as Bracton says, to make out either one or the other; and this was the governing rule, whether the plea came from the tenant or demandant [o]: so that in this issue the point to be proved was, sometimes the legitimacy, and sometimes the bastardy, according as the *onus probandi* was imposed by the above rule.

Writ to the ordinary.

The writ to the ordinary in cases of bastardy differed very little from that used in the time of Glanville. It recited that a suit was commenced, and that bastardy was objected to one of the parties: *Et ideo vobis mandamus, quòd convocatis coram vobis convocandis, rei veritatem inde diligenter inquiratis, videlicet, utrùm A. &c. Et inquisi-*

[m] Bract. 417. [n] Ibid. 418. [o] Ibid. 418. b.

*tionem,*

*tionem, quam inde feceritis, ſcire faciatis nobis, vel juſtitiariis noſtris talibus per literas veſtras patentes. Teſte, &c.* and ſo, *mutatis mutandis*, according to the ſpecial cauſe of baſtardy. There was this difference between the writ of *natus ante matrimonium* in the time of Glanville, and that now in uſe, that they no longer inſerted theſe words, *et quonium hujuſmodi inquiſitio pertinet ad forum eccleſiaſticum*; an alteration which probably had taken place ſince the ſtatute of Merton, and the abovementioned proviſion of the council on that ſubject. The ſame was obſerved if the ordinary was directed, as he ſometimes was, to enquire concerning the legitimacy of a poſthumous child; both theſe queſtions being triable as well at common law as in the ſpiritual court. But the above form of words was retained in all caſes that were purely of eccleſiaſtical cogniſance.

When the writ was ſent to the ordinary, the plea remained *ſine die* in the king's court till the inquiſition was returned. The ordinary was to proceed to make inquiſition in the preſence of the parties, if they choſe it [q], and when made, there lay no appeal. When the inquiſition was returned, the plea and the other party were ſummoned. The effect of a legitimacy proved in this way, if confirmed by a judgment in the king's court, was, that the party became legitimate againſt all the world, unleſs any fraud could be proved in the method of proving it, and in the inquiſition. A fraudulent inquiſition might be obtained in this way. A demandant might bring ſeveral writs for recovery of land, and procure one of the tenants to object baſtardy, and to ſuffer an inquiſition to paſs in his favour, for want of conteſting the proofs of legitimacy. Legitimacy, when regularly proved, was good againſt all the world, and the heir of ſuch perſon was likewiſe entitled

[q] Bract. 419.

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to the benefit of it. It was a rule, that no perſon's legitimacy could be queſtioned after his death by plea pleaded, as he could not, ſays Bracton, make an anſwer to it; but, notwithſtanding, it might be inquired *per patriam* whether ſuch perſon was a baſtard or not, in the ſame manner as the queſtion whether a perſon held in free tenure or in villenage; although it could not be inquired, after his death, concerning the perſonal condition of ſuch perſon[r]. When profeſſion, or entering into a religious life, was objected, this iſſue was always tranſmitted to the inquiry of the ſpiritual court[s].

Of minority.

THE plea of minority of the demandant was only a dilatory exception, that did not abate the writ, but ſuſpended the action till he came of age, at which time the plea would be re-ſummoned. There were ſome actions which a minor might bring, and ſome which he might not. A minor might demand his own ſeiſin by aſſiſe of novel diſſeiſin, and the ſeiſin of his anceſtor by *aſſiſa mortis anteceſſoris*; but when he had ſo recovered, he was not obliged to anſwer either for the poſſeſſion or right, till he was of age: yet he could not demand land in free ſocage of his anceſtor's ſeiſin in a writ of right, before he was fourteen years old, nor *feudum militare* till he was completely twenty-one years old. On the other hand, a minor was bound to anſwer as well upon the right as upon the poſſeſſion, if he had been enfeoffed of the land in queſtion during his minority; and would have all the privileges of eſſoins, vouching and the like, except that he could not appoint an attorney, and conſequently he could not have the eſſoin *de malo lecti*. A minor was obliged to anſwer for a fact and injury of his own, in a civil or criminal ſuit. Thus he was liable to an aſſiſe of novel diſſeiſin, and to a ſuit for dower. But where a grandmother had neglected

[r] Bract. 420. [s] Ibid. 422. b.

for

for ten, twenty, or thirty years, during the life of her ſon, to demand dower, and brought a writ againſt the grandſon, ſhe was obliged to wait till he was of age, on account of the probability that ſhe had agreed with her ſon and releaſed the claim [t].

A MINOR was obliged to anſwer in a matter that concerned the king. For ſuch purpoſe, an inquiſition might be made, whether his anceſtor died ſeiſed *ut de fœdo*, without prejudicing the heir. A minor muſt anſwer to a fine, if pleaded; but if he was vouched by virtue of a fine, he need not anſwer; though he would be obliged to anſwer in *warrantia cartæ*. A minor muſt anſwer in *aſſiſa mortis anteceſſoris*, and in every other plea concerning any thing of which his anceſtor did not die ſeiſed *in dominico ut de fœdo*, but concerning nothing of which he died ſeiſed *in dominico ut de fœdo*. If a minor loſt by aſſiſe in a writ of poſſeſſion, he might, when of age, recover in a writ of right. A minor muſt anſwer as well on the fact of another as on his own, ſo as to make reſtitution, though not *quoad pœnam*; as when a writ of entry was brought immediately after the death of the anceſtor who had committed diſſeiſin. A ſingular inſtance, where the privilege of infancy was diſpenſed with, is mentioned by Bracton. A man bound himſelf and his heirs to anſwer whether they were of age or not. This obligation was made in and by the advice of the court, and the heir was adjudged to anſwer, though a minor.

IN the caſe of inquiſitions taken for the king, a minor might have a writ to the following effect, to ſave himſelf from being affected thereby. *Rex vic. ſalutem. Præcipimus tibi, quòd non implacites vel implacitari permittas A. qui eſt infra ætatem, ut dicitur, de libero tenemento ſuo in villâ, &c. donec idem A. ſit ætatis quòd poſſit & debeat*

[t] Brac. 421 b. 422.

*ſecundum*

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*ſecundum legem & conſuetudinem Angliæ de tenemento reſpondere*[u]. If a minor was vouched to warranty in the county, he might have the following writ to the ſheriff: *Præcipimus tibi, quòd non permittas quòd A. implacitet B. de tantâ terrâ cum pertinentiis in tali villâ, unde idem A. trahit ad warrantum C. qui eſt infra ætatem, et warrantus ejus eſſe debet, ut dicit, donec idem C. ſit talis plenæ ætatis quòd poſſit et debeat ſecundum legem & conſuetudinem Angliæ terram warrantizare.*

If there were more demandants than one, as parceners, and one was a minor, it would be a good plea againſt all: the ſame, if parceners were tenants. So if a man ſeiſed in right of his wife was tenant to a writ, together with her, and ſhe was within age, the plea againſt both would remain *ſine die* till ſhe was of age: not ſo if the huſband was a minor; becauſe, ſays Bracton, a woman might, by contriving ſuch a marriage, defeat ſuits againſt her reſpecting her own lands. If the huſband and wife were demandants, and ſhe was a minor, and married before the writ purchaſed, the plea would remain *quouſque*: if ſhe married after, the writ abated, ſhould the tenant ſo pleaſe, or the action was ſuſpended till ſhe was of age[x].

Such conſideration was ſhewn to the feeble condition of a minor, that his eſtate, whether in ſervices or tenements, deſcended to him from his anceſtor, who was *peaceably ſeiſed* thereof *anno et die quo vivus, et mortuus fuit*, was not to be called in queſtion till he was of full age. So, on the other hand, if a minor demanded ſervices that were not due to him, and the tenants alledged[y] *quietanciam quo die et anno anteceſſor vivus et mortuus*, they need not anſwer till he was of age. A minor was not obliged to anſwer to any

[u] Bract. 422. [x] Ibid. 423. [y] *Quietanciam*, peaceable ſeiſin.

*charta*

*charta* till he was of age [z]. This held not only in services or tenements, but in rights and liberties, by which the tenements of others were effected; as a liberty to make a road, build a mill, and the like. Altho' he did not actually use these easements, yet he was considered in possession thereof till ejected or disseised; and such a seisin would descend upon the heir, whose estate therein was not to be changed during his minority [a].

To a plea of minority in a writ of right, or *assisa mortis antecessoris* against a guardian, the demandant might reply, that he was of full age, as appeared by all his lords having restored his inheritances to him; or he might say, he had proved himself of age, either by inquisition *per patriam*, or before certain justices. To this it might be rejoined, that his inheritances were restored to him *per fraudem*; or that the jurors had sworn falsely, or that the justices had been deceived. The only sufficient and complete proof of full age was, that by the parents, and the examination of witnesses; all others, as inspection and the like, were held only to induce a presumption: yet, says Bracton, if the justices, upon sight of the person, judging from his stature and other circumstances, pronounced him to be of age, his age was confirmed by judgment, and could not be again disputed. Should the justices hesitate to pronounce an opinion, then recourse was, of necessity, had *ad probationem patriæ et parentum*. This, says Bracton, was to be done by twelve lawful men, or more, if necessary, some of whom were to be *ex parentelâ* of the person who said he was of age, the rest were to be strangers: all these were to be unsuspected, and were to declare the truth, upon their oaths [b]. Another presumption of full age was, a conclusion arising from the party having brought actions as a person of full age, which was an admission that would preclude him from pleading his infancy to any action brought against

[z] Bract. 423. [a] Ibid. 424 [b] Ibid. 424. b.

himself;

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himself; whereas a proof of full age by jurors, according to some opinions, was not held conclusive against other persons, because the jurors might, perhaps, swear falsely.

If the minor was demandant, the proof was made without any resummons; but if he was tenant, and pleaded his minority, then the proof was not made till after a re-summons. This was sued out by the demandant; and on the return if there was any doubt, then they entered upon the proof in the way before mentioned [c].

Excommunication.

The excommunication of the demandant was only a dilatory plea. This was to be proved by the letter of the ordinary, or some judge delegated by him with proper authority. To this exception it might be replied, that he was absolved upon an appeal, or that the cause of his excommunication was, his not obeying the ecclesiastical judge in a question of lay fee, and the like [d]. We have seen before, that when a person had been excommunicated for forty days the ordinary used to certify this contempt, and, upon receipt of the bishop's letter, the chancellor would issue a writ to the following effect, directed to the sheriff: *Significavit nobis venerabilis pater N. per literas suas patentes, quòd A. ob manifestam contumaciam suam excommunicatus est, nec se vult per censuram ecclesiasticam justiciari. Quia verò potestas regia sacrosanctæ ecclesiæ in quereulis suis deesse non debet, tibi præcipimus, quòd prædictum A per corpus suum (secundum consuetudinem Angliæ) justicies, donec sacrosanctæ ecclesiæ tam de contemptu quàm de injuriâ ei illatâ fuerit satisfactum. Teste, &c.* When the person was taken, and had satisfied the ecclesiastical judge, he might be discharged, at the command of the bishop, by the following writ to the sheriff: *Quia venerabilis pater N. episcopus significavit nobis, quòd A. quantum ad mandatum suum à te capi, et per corpus suum tanquam contemnentem claves*

[c] Bract. 426. [d] Ibid. 426. b.

*ecclesiæ*

*ecclesiæ justiciari præceperimus, beneficium absolutionis impendit, tibi præcipimus quòd à prisonâ nostrâ quâ detinetur ipsum deliberari facias quietum, &c.* As no one could be taken, so none could be discharged, but by the command of the bishop; the law not giving such credit to an archdeacon, or other delegated judge; because, says Bracton, *rex in episcopos coercionem habet propter baroniam:* nor was the party to be discharged till he had satisfied the ecclesiastical judge, unless where an excommunication was obtained by a false suggestion of the ordinary himself, or the malice of an adversary, in order to preclude the party from the right to bring an action; in which case a writ used to issue to the sheriff, reciting the fraud, and commanding him to discharge the injured person upon sureties, *nisi captus fuerit aliâ occasione, quare deliberari non debeat.* We have before seen that where such malicious proceeding was apprehended, the party might be beforehand with the ordinary, by the writ *de non capiendo*[f].

Parceners.

PARTICIPES were either co-heirs or *parceners*, or such as were afterwards better known by the name of *jointenants*. If an action was brought by one of several parceners, it might be pleaded, *quòd non teneor ad hoc breve respondere, quia si jus haberes, participes habes, qui tantundem juris haberent in se quantum et vos, scilicet A. et B.* To this it might be replied, that all who could claim any right were named in the writ[g], and no right was in *A.* because he was a bastard; nor in *B.* because, born of a villain, although his mother, from whom he claimed, was free: he might say, that the other parcener was in ligeance to the king of France, or that his ancestor committed felony, and many other matters might be replied to shew that the parceners not named had no right[h]. If parceners were all of capacity to sue, and some brought a writ, and recovered without

[f] Bract. 427. [g] Bract. 428. [h] Ibid. 428. b.

naming

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naming the others, Bracton says, it was the duty of the judge to take care that the interest of those not named, suffered no injury by this fraud. If they were all named, and some declined proceeding, yet the writ would stand good, and those who did not appear would be summoned, *quòd sint ad sequendum simùl* with the other parceners thus: *Summone per bonos sum. A. et B. quòd sint coram justitiariis nostris die, &c. et loco, &c. ad sequendum cum C. et D. de tantâ terrâ unde prædicti C. et D. clamant duas partes versus E. ut rationabilem partem suam, quæ eos contingit de hæreditate R. cujus hæredes ipsi sunt, et unde prædictus E. dicit quòd non vult prædictis C. et D. respondere sine prædictis A. et B. ut dicit; et habeas ibi, &c*[i].

If the writ was brought against one parcener, he might, in like manner, plead this to the writ. But there was some difference, whether the inheritance was divided or not: if not, and they held in common, each had the same right to the whole; not indeed to himself, but only in common with the others; or, as they expressed it, *totum tenet, et nihil tenet, scilicet totum in communi, et nihil separatim per se.* If the inheritance had been divided, and each held *pro parte*, the other parceners need not be named: yet, on the other hand, says Bracton, the tenant was not bound to answer without his parceners, and in prudence he ought not; for if he did, and he lost the land, he could have no *regressum* against his parceners to obtain a contribution. The tenant, therefore, if he pleased, might have a writ to summon them: *Summone, &c. quòd sint coram justitiariis, &c.* AD RESPONDENDUM *C.* SIMUL CUM *D. de tantâ terrâ, &c. quam idem C. in curiâ nostrâ clamat, &c. et sine quibus prædictus D. non vult respondere eidem C. cùm prædicti, &c. sint participes ipsius D. de terrâ prædictâ, &c.* Should they appear, they might answer together with the

[i] Bract. 419.

tenant;

tenant; but if they declined anſwering, the plea ſtill proceeded; and whether they appeared or not, the tenant, if he loſt, would be entitled to contribution. If the inheritance was not divided, then all the parceners muſt be made parties; but upon a plea that there were other parceners, the demandant might reply ſuch matter as would diſable them from claiming any right, and therefore as not being perſons who need be named in the writ, the ſame as was before ſaid in the caſe of a demandant [k].

Pleas to the action.

If there was no plea to the perſon, either of the demandant or tenant, the next conſideration was ſuch as might ariſe upon the matter itſelf. The thing in demand ought to be ſtated with certainty; in which the count or declaration, or, as Bracton calls it, the *intentio*, or *narratio*, ſhould correſpond with the writ [l]. Perhaps the tenant in the action was not tenant of the land, or was tenant only of a part; or perhaps he held it only in the name of another. Thus he might hold it in ward, *in vadium*, at will, or for term of years; in either of which caſes the writ ſhould be brought not againſt him, but againſt the perſon in whoſe name he was ſeiſed; and if this was pleaded, it would abate the writ [m]. In ſuch caſe he might plead, generally, *non tenet*, or that the freehold was not in him. If he put himſelf upon the country for the truth of ſuch a plea, and it was found againſt him, he would loſe the land in queſtion, as a penalty for his falſe plea: the ſame, if he ſaid he did not hold it, but another did. But if he admitted that he held part, and ſaid that another held the reſt, and this was found againſt him, he did not loſe the whole, nor a part, on account of his falſe plea, but the ſuit went on, and he was to anſwer for the whole. He might plead that he once held the land, but that he did not at the preſent time [n]. If this was owing to an alienation before the purchaſe of

Non tenure.

[k] Brac. 430. [l] Ibid. 431. [m] Ibid. 431. b. [n] Ibid. 432.

the

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the writ, no fraud could be objected; nor indeed, if after the purchaſe, provided he was ignorant of the writ. In ſome caſes the alienation might be even after the ſummons, without being fraudulent; as if he went beyond ſea either before or after the purchaſe of the writ, not being prevented by the ſummons, and knowing nothing of it, and there made an alienation: but if neither of the beforementioned caſes could be proved, and eſpecially if the alienation was after the ſummons had been teſtified and proved, he was conſidered as the real poſſeſſor, and was to ſtand to the ſuit as tenant [o].

He might plead that he held only ſo many acres, whereas the demandant claimed ſo many; upon which an inquiſition might be had by a writ to the ſheriff, directing him to ſummon four, ſix, or more of lawful men of thoſe who made the view, and by them to make inquiry whether the tenant held ſo many or ſo many acres. Again, in a plea of *non tenet*, if the tenant had before confeſſed in the county court, that he held the whole, a writ went to the ſheriff, commanding him to make a record of the plea in which ſuch confeſſion was made [p]. If the demandant, after a plea of *non tenet*, made a *retraxit*, and commenced a ſuit againſt another, the tenant would not ſuffer any penalty for his falſe plea [q]. Exception might be made to the name of the *vill*, any miſtake in which would be an incurable error [r].

Another part of the writ, or count, to which an exception might be made, was the claiming the land *ut jus meum*. To this the tenant might anſwer, that he had *majus jus*; and this iſſue would be tried by the great aſſiſe, or duel, as the tenant pleaſed. It has been before ſhewn, that the beſt title, in the law, was where the *jus poſſeſſionis* and *jus proprietatis* were united, which was therefore called *droit droit*; and it was a maxim, that whoever had the *jus pro-*

*Majus jus.*

[o] Bract. 432. b. [p] Ibid. 433. [q] Ibid. 433. [r] Ibid. 434.

*prietatis*

*prietatis* ought to have the poſſeſſion. *Poſſeſſio ſequitur proprietatem*, but not *vice verſâ*. The *proprietas* might be ſeparated from the *poſſeſſio*, in this manner; upon the death of the anceſtor, the *proprietas* immediately deſcended to the next heir, whether he was preſent or not; but not being preſent, the *poſſeſſio* might be obtained by another, who put himſelf into ſeiſin; by virtue of which the *jus poſſeſſionis* would deſcend to his heirs, through the negligence of him who had the *proprietas*. Thus, while the *jus proprietatis* deſcended on the elder brother, the younger brother might obtain ſeiſin and die ſeiſed, tranſmitting to his heirs, together with the *jus poſſeſſionis*, which he himſelf had, a ſort of *jus proprietatis*[s]; ſo that there would be two *jura proprietatis* in different perſons by different deſcents: but one, as the deſcendants of the elder brother, would have MAJUS JUS *proprietatis*, on account of the priority; and thoſe from the younger brother *minus jus*; yet the *poſſeſſio* of the latter would prevail, till the former evicted them of the *jus proprietatis*.

ANOTHER plea which the tenant might plead, was, that the demandant, or one of his anceſtors, had releaſed to the tenant, or ſome of his anceſtors from whom he derived the *jus poſſeſſionis*, and quit-claimed for himſelf and his heirs by a fine made in the king's courts[t]; or that the demandant or ſome anceſtor loſt the land in queſtion, in judgment in an action *de proprietate*, as by the great aſſiſe or duel, or a jury, on which he had put himſelf; and theſe pleas were to be proved by the record of the juſtices. Releaſe.

IF the demandant or any of his anceſtors had been appriſed of any litigation, or final concord made concerning their right, and had not put in their claim, this ſilence might be pleaded againſt the demandant to a writ brought to eſtabliſh ſuch right. The manner of making a claim Fine and non claim.

[s] Bract. 434 b. [t] Ibid. 435.

was

was simply by the words[u], *appono clameum meum*; or, what had the same effect, by commencing a suit; a fact like this being a stronger proof than a mere claim, that he did not mean to abandon his pretensions. This claim was to be made pending the plea, and the making of the *cyrographum*, or before judgment, provided he was in court at the time, or in the kingdom within the four seas; and in such case, ignorance was no excuse: nor, says Bracton, as it should seem, would he afterwards be heard; for if it was a fine, the time taken up by the pendency of the action afforded, at least, a month for putting in a claim; for the summons ought to be served fifteen days at least, that being what was called reasonable summons; and the *cyrographum* used not to be allowed at the return of the writ, but a day was given at fifteen days at least, when the *cyrographum* was to be taken; during all which time there was sufficient opportunity to make claim. Indeed a month was the period which Bracton says was limited for this purpose, *secundum communem provisionem regni*; and therefore he calls it the legal time for making the *cyrographum*; so that if it was made before, it was fraudulent, and no claim need be made to invalidate it[x]. The place to make claim was in the king's court, at the time of passing judgment, or before.

HOWEVER, there were certain causes of excuse, which would protect a party from the consequence of having omitted to make his claim; as, if at the time of the fine and making the *cyrographum*, the person who ought to make the claim was within age, or *non sanæ mentis*; if he was an ideot, born deaf and dumb, or the like. But when such person came to age, or recovered his senses, it was the opinion of some, that he ought to make that claim then, which he could not make before; and, according to some, if a minor did not do it within a year after he came of age, he would not be excused: yet Bracton says, that he was ex-

[u] Bract. 435 b. [x] Ibid. 436.

cused,

cuſed, though he made no claim within that time, and that a claim need not be made at all, and would have no avail after judgment paſſed, or the delivery of the *cyrographum*. A perſon who was in priſon at the time of the ſuit, or detained by ſuch a diſorder as did not allow him either to come or ſend, would be excuſed; as would alſo, for the ſame reaſon[y], a perſon who was reſtrained by force, even out of priſon. A married woman, even though ſhe might ſend, would be excuſed, as *ſub poteſtate viri*; ſo that all ſorts of impotence ſeemed ſufficient excuſe; and upon this idea, a perſon who was *ultra mare* at the time was excuſed: and none of theſe, according to Bracton, need make any claim after thoſe impediments were removed, if judgment was paſſed, or the *cyrographum* delivered.

ANOTHER caſe in which a party was excuſed, though he made no claim, was, where the fine, according to the words of Bracton, *ipſo jure ſit nullus*; as if it was made of a tenement in the poſſeſſion of another perſon, perhaps of the perſon himſelf to whom it was objected that he made no claim, or ſome anceſtor, and not of him (or his anceſtor) who pleaded the fine[z]; or if the fine was made by any colluſion or fraud, or in any way to the prejudice of another, as that it ought not in juſtice and equity to hold good. A perſon would likewiſe be excuſed, if there was no *cyrographum*; or if a diſſeiſor made a feoffment and then a fine, ſuch a fine might be revoked and made void: ſo, if at the time of the ſuit, neither himſelf nor his anceſtors had any title to the tenement in queſtion; or if the anceſtor who ought to have made the claim, was not an anceſtor through whom any right could deſcend to the perſon againſt whom the fine was pleaded. Bracton ſays, that notwithſtanding a fine and *cyrographum* might ſeem *primâ facie* to be revocable in many caſes, becauſe the perſon making it was

[y] *Ubi eadem ratio, ibi idem jus.*

[z] Brac. 436. b.

only

only tenant for life, in dower, and the like, or becauſe the land in queſtion was held in villenage; yet all perſons were in law bound by this judgment; and therefore, if they made no claim, they would not be excuſed. In ſhort, it is declared by Bracton, that no perſon ſhould be excuſed if he was in the kingdom, *infra quatuor maria*, and had it in his power to come or ſend; ſo that even a perſon *in languore* would not be excuſed, becauſe he might ſend [a]. If a perſon was *in ſervitio regis*, ſo as he could neither come nor ſend, he was excuſed, although he made no claim. Thus ſtood the law upon the ſubject of claim, to ſuſpend the effect of a judgment or fine.

FROM the manner in which Bracton ſpeaks of a fine, it ſhould ſeem as if this judicial concord was entered into after a proceeding was commenced on any writ whatſoever, which was grounded on the *proprietas*; and that it was not confined to a writ of covenant, grounded upon the breach of a ſuppoſed prior agreement and concord: it ſeems particularly to have been made in a writ of right, and is all along mentioned in company with a judgment therein, upon the great aſſiſe or duel.

Of perſonal actions.

WE have now diſmiſſed the ſubject of real actions, thro' all their parts and kinds. It remains to add ſomething on the nature of proceſs in actions perſonal. Theſe, like real actions, were commenced by ſummons; but if a defendant omitted to appear upon a lawful ſummons, the contempt was treated in a different manner; for they proceeded by attachment, as appeared in Glanville's time [b]. Perſonal actions differed likewiſe in their proceſs, according to circumſtances: in ſome cauſes, which from their nature would not bear delay; as where the ſubject was the fruits of the earth or other things, which were periſhable; the *ſolennitas attachiamentorum*, as it was called, was diſ-

[a] Bract. 437. [b] Vid. ant. 121.

penſed

penſed with [c]: ſo again, where the lapſe of a benefice was apprehended, or where the injury was very atrocious, or the plaintiff deſerved a particular reſpect or privilege; as noble perſons, or merchants who were continually leaving the kingdom. But in perſonal actions which did not require ſuch ſpecial favour, if the defendant did not appear to the ſummons, and the plaintiff offered himſelf in court the firſt, ſecond, third, and fourth day, he was not to be waited for any longer; but, whether the ſummons was proved or not, ſo as it was not openly denied, he was to be attached by pledges. Upon which the entry on the roll was thus: *A. obtulit ſe quarto die verſus B. de placito;* then the ſubſtance of the writ was added; and it went on, *et B. non venit, et ſummonitus, &c. Judicium, Attachietur quòd ſit coram, &c.* The writ of attachment was, *Pone per vadium et ſalvos plegios B. quòd ſit coram, &c. ad reſpondendum de placito;* and then followed the ſubſtance of the writ as upon the roll. The following inſtances of ſuch entries upon the roll are given by Bracton: *De placito quare non tenet ei conventionem inter eos factam,* or *finem inter eos factum de, &c.—De placito quòd warrantizet ei tantam terram cum pertinentiis, &c.—De placito quare non facit ei conſuetudinem et certa ſervitia, quæ facere ei debet, &c.—De placito quòd reddat ei tantam pecuniam quam ei debet et injuſtè detinet, &c.—De placito quare idem B. ſimul cum aliis venit ad domum ſuam, et ibi* did ſuch a treſpaſs, *contra pacem noſtram.* Thus the attachment purſued the nature of the original writ; and at the end was added this clauſe: *Ad oſtendendum quare non fuit coram, &c. ſicut ſummonitus fuit:* or if he had eſſoined himſelf to a particular day, then, *ad oſtendendum quare non ſervavit diem ſibi datum per eſſoniatorem ſuum, &c.* to which he was to anſwer before he anſwered to the principal

Attachment.

[c] Bract. 439.

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point; and if he could not excuſe himſelf, he was to be *in miſericordiâ* for his default.

If he did not appear after this firſt attachment, then, upon the plaintiff offering himſelf, he was to be attached by better pledges, to anſwer on another day: this was called *aforciamentum plegiorum*, and was in the nature of diſtreſs for ſervice, where, if the party appeared not at the firſt diſtreſs, more cattle were taken *pro aforciamento diſtrictionis* [d]. The entry on this occaſion was, *A. obtulit ſe quarto die verſus B. de placito*, &c. as before; *et B. non venit, et aliàs fecit defaltam poſtquam fuit ſummonitus; et ita quòd attachiatus tunc fuit per C. et D. Judicium, Penatur per meliores plegios quòd ſit*, &c. upon which there iſſued a ſecond attachment, in which was likewiſe contained a ſummons againſt the former pledges, to ſhew cauſe why they did not produce the defendant, as they had engaged to do. If neither the defendant nor pledges appeared to this writ, all the pledges were *in miſericordiâ* and not the defendant; but then all the defaults fell upon the defendant, as if he had found no pledges at all; and a writ iſſued, *quòd ſit ad audiendum judicium ſuum de pluribus defaltis*; and from that day all aforcement of pledges ceaſed. If the defendant appeared to the ſecond attachment, then only the firſt (and not the ſecond) pledges were to be amerced, unleſs they ſhewed cauſe why they did not produce him at the firſt attachment. However, though the defendant was not to be amerced, but ſummoned to hear judgment on his defaults, yet Bracton thinks it was otherwiſe in regard to a plaintiff who had found pledges *de proſequendo*, and did not proſecute his ſuit; for, according to him, they were all to be amerced, as well the principal as the pledges.

If, at the firſt day of ſummons and attachment, neither defendant nor plaintiff appeared, the plaintiff did not, however, loſe his writ. When the demandant had been attached by better pledges, and did not come to his day, nor

[d] Bract. 439.

within

within the fourth day, and the plaintiff did [e], the entry was thus: *A. obtulit se quarto die versus B. et B. non venit, &c. et blures fecit defaltas, ita quòd primò attachiatus fuit per C. et D. et secundò per E. et F. et ideò omnes plegii in misericordiâ*; and then the process above alluded to issued against the defendant, commanding the sheriff, *quòd habeas coram, &c. corpus B. ad respondendum A. de placito, &c. ad audiendum judicium suum de pluribus defaltis, &c.* If he came at the day and could not save his defaults, he was to be amerced for them, and then to answer to the action. If he did not appear, but concealed himself, or, as they called it, *latitaverit*, so that the sheriff returned, *he was not to be found in his bailiwick*; then the entry was thus: *A obtulit se quarto die versus B. de placito*, as before; *et B. non venit, et plures fecit defaltas, ita quòd præceptum fuit vicecomiti, quòd haberet corpus ejus*; *et vicecomes mandavit quòd non fuit inventus in ballivâ suâ, et ideò vicecomes distringat eum per omnes terras et catalla, quòd sit ad, &c.* upon which there issued a writ of *distringas* against his lands and chattels. If he did not appear to this writ, his default was punished by another writ of *distringas*, commanding the sheriff to distrain his lands and goods, *et quòd sit securus habendi corpus ejus* at another day. If he still made default, the next *distringas* was, *ita quòd nec ipse, nec aliquis pro eo, nec per ipsum manum apponat in terris, tenementis, bladis, nec in aliis catallis.* If he still made default, the next *distringas*, if it could be so called, was, *quòd capiat omnes terras et omnia catalla in manum domini regis, et capta in manum domini regis detineat, quousque dominus rex aliud inde præceperit, et quòd de exitibus respondeat domino regi*: and beyond this there was no further process *per terras et catalla*, they being both taken into the king's hands by the sheriff, who was to answer for the profits to the crown.

[e] Bract. 440.

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WHAT ſtep was to be taken by the plaintiff who had ſuffered all theſe delays? for it was hard that, after all, he ſhould loſe the effect of his ſuit. Bracton thinks that in this, there was a difference between actions upon a contract for a ſum of money, and for a treſpaſs. In the former, he thought it would be right to adjudge to the plaintiff a ſeiſin of the chattels to the amount of his demand, and to give him a day, and ſummon the defendant; when, if he appeared, the chattels ſhould be reſtored, upon his anſwering to the action: if he did not appear, he ſhould not be heard upon the matter, but the plaintiff ſhould become lawful owner thereof. But if it was an action of treſpaſs [f], then he thought, the juſtices ſhould eſtimate the damage ſuſtained; and the rents and chattels of the fugitive being valued, a portion ſhould be taken into the king's hands to the amount of the damage, as a penalty on the defendant.

SHOULD the defendant, however, not be found, nor have any land or goods, he did not wholly eſcape the reſentment of offended juſtice; for whether it was an action for money, or a treſpaſs, the defendant was to be demanded from county to county, at the ſuit of the plaintiff, till he was outlawed. Perſons ſo outlawed were not, upon their return, or being taken, to loſe life or limb, as thoſe outlawed for crimes; but were condemned to perpetual impriſonment, or to abjure the realm.

Execution of the writ.

IT ſometimes happened that the ſheriff did not execute the attachment, nor return the writ; and then, upon the plaintiff offering himſelf, the entry was thus: *A. obtulit ſe quarto die verſus B. de placito, &c. et B. non venit, et præceptum fuit vicecomiti, quòd attachiaret eum, quòd eſſet ad talem diem, et ipſe vicecomes inde nihil fecit, nec breve quod ſi inde venit, miſit; et ideò præceptum eſt vicecomiti, ſicut aliàs, quòd attachiaret eum, quòd ſit ad, &c. et*

[f] Bract. 440. b.

*quòd*

*quòd ipſe vicecomes ſit ibi auditurus judicium ſuum de hoc quod prædictum, &c. non attachiavit, nec breve quod ei inde venit, miſit, ſicut ei præceptum fuit.* Upon this there iſſued an *aliàs* attachment: *Præcipimus tibi, ſicut tibi præceperimus, &c.*[g]. If the ſheriff did nothing upon the writ, nor ſhewed any ſufficient excuſe, he was amerced for his contempt, and was commanded a third time to attach the party: *Præcipimus tibi, ſicut* SÆPIUS *præceperimus, &c.*

ALIAS

SOMETIMES the ſheriff ſent an excuſe for not executing the writ. He would ſometimes return, that the writ came too late to be executed; that the party was not to be found in his bailiwick; that he was wandering from county to county, and had no certain reſidence; that he had no lands or chattels by which he might be diſtrained; and many other excuſes might be feigned. Again, ſhould the ſheriff err in the ſort of attachment; as when he was to take pledges ſhould he make a diſtreſs; or, inſtead of taking the perſon, ſhould he admit to bail; in all ſuch caſes it was uſual to make an entry of the return, and to ſpecify it in the writ that iſſued in conſequence thereof: as for inſtance, *et B. non venit, et vicecomes mandavit, quòd non attachiavit eum, quia recipit breve tam tardè quòd præceptum domini regis exequi non potuit:* and if it was proved that he received the writ in good time, or in the county court, and might have executed it, the record went on, *Et teſtatum eſt, quòd iſtud recepit ſatis tempeſtivè* (or, *in comitatu ubi attachiandus præſens fuit*), *et ideò præcipiatur quòd, &c.* Upon this a writ iſſued, commanding him to attach the party[h], and appear himſelf to anſwer for his default; and if he failed in either, he was *in miſericordiâ.* A ſheriff was ſometimes excuſable for not executing proceſs by reaſon of ſome liberty which he could not enter, becauſe the lord thereof had the *retorna brevium* therein. In ſuch caſe, the

[g] Bract. 441. [h] Ibid. 441 b.

ſheriff

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ſheriff was to command the bailiff of the liberty to execute it; and if he did not do it, the ſheriff was excuſable before the juſtices, by making a return, *quòd preceptum eſt ballivo.* When the bailiff thus failed in doing his duty, the ſheriff was then commanded not to omit doing it by reaſon of that liberty; under which ſpecial warrant the ſheriff had an authority that did not generally belong to him. The entry upon the record was, *Et vicecomes mandavit, quòd præcepit ballivis libertatis, et ipſi nihil inde fecerunt, et ideò præceptum fuit vicecomiti, quòd* NON OMITTAT PROPTER LIBERTATEM *quin, &c.* and there iſſued a writ *quòd non omittas,* containing an attachment, *diſtringas, habeas corpus,* or whatever the neceſſary proceſs might be, by which alſo the bailiff of the liberty was ſummoned to ſhew cauſe for his neglect [i].

If the ſheriff was reſiſted in the execution of this writ by the bailiff or lord of the franchiſe, there iſſued another *non omittas,* with a clauſe authorizing him to go, with ſome ſufficient knights and free men of the county, and take the bodies of ſuch as reſiſted them, and keep them in priſon till the king's pleaſure was known concerning them: the lord of the liberty was likewiſe attached to appear and anſwer for the offence; and if he could not deny it, his liberty was ſeized into the king's hands for ſuch an abuſe of it.

A SHERIFF might ſay that the perſon was a clerk, and claimed the privilege of a clerk not to find pledges, and that he had no lay fee by which he could be diſtrained. It ſeems from Bracton, that in ſuch caſe they did not proceed directly againſt a clerk, particularly in treſpaſſes; but the courſe was to reſort to the archbiſhop, biſhop, or other in whoſe dioceſe the perſon to be attached reſided, or had an eccleſiaſtical benefice, and require him, *quòd faciat, &c. clericum venire* [k]. If the biſhop neglected to obey this writ, he was ſummoned to anſwer for his default; to which if

[i] Bract. 442. [k] Ibid. 442. b.

he

he made no appearance, there run againſt him all the *ſolennitas attachiamentorum*, as in other diſtreſſes, and he was immediately diſtrained by his barony [l]: and if neither the biſhop appeared nor the clerk, then they proceeded by judgment of the court againſt the clerk, who was arreſted and detained till he was demanded by the biſhop. At any rate, it was expected, a biſhop, who held a barony of the crown, ſhould obey the king's writs; and if a clerk did not appear, the biſhop might bring or ſend an excuſe, why he had not the clerk according to the requiſition of the writ: he might ſay, that he had no benefice in his dioceſe by which he could be diſtrained; or if he had a benefice, he might ſay, that he was a ſtudent at Paris beyond the ſea, that he did his utmoſt in ſequeſtering him by his prebend and other benefices, and could do no more in the way of compulſion. This would be a complete juſtification for the biſhop, and all proceſs would ceaſe till the clerk returned, and could be taken; and then, if the biſhop omitted, the ſheriff might proceed as above-mentioned [m].

It was ſaid before, that in ſome perſonal actions the *ſolennitas attachiamentorum* was not to be obſerved, and this was in ſeveral caſes of privilege; as, in addition to thoſe that have been already mentioned, where the plaintiff was a cruſader or a merchant, whoſe affairs demanded diſpatch; where there was ſome urgent neceſſity; as in aſſiſes of darrein preſentment, *quare impedit*, and *non permittit*, leſt the plaintiff ſhould incur the lapſe of ſix months; where the ſubject in conteſt was a periſhable article, as ripe fruit; or, in an action of treſpaſs, where the jury was atrocious, and againſt the king's peace; where regard was to be had to the quality of the perſon injured, as the king, queen, or their children, brothers, ſiſters, or any of their relations or kin; in any of the above caſes, it was uſual, in the firſt inſtance, to have a writ to the ſheriff, *quod habeat corpus, &c. ad*

[l] Bract. 443.

[m] Ibid. 443. b.

*reſpondendum.*

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*respondendum*. But this writ against the body, instead of the clause *ad audiendum judicium de pluribus defaltis* (which would have been absurd), had one, containing the cause wherefore the formality of attachment was dispensed with; as, *Præcipimus tibi, quòd, omni occasione & dilatione postpositâ, propter privilegium mercatorum, quorum placitum instantiam desiderat, habeas, &c.* and so in other cases. But, notwithstanding this intention to avoid delays, the defendant might have an essoin *de malo veniendi*, before he appeared [n]. In capital cases, there was no attachment but that *per corpus*; and any one, with or without a precept, might arrest such an offender [o].

In mixt actions, as those for dividing a common, *de proparte sororum*, of *partition*, and the like, the usual process was, distress real, and not distress personal.

Thus far Bracton speaks of the commencement of mixed and personal actions; but, notwithstanding the full manner in which he has treated the whole proceedings in real actions, he leaves these without any further discussion [p]. The small proportion that personal property bore to real, in these days, might be a reason why the remedies provided for the recovery of it should have undergone very little consideration. Consistently with the inferior light in which personal property was held, it is probable, that the nature of personal actions had not been much refined upon: we shall see, in the following part of this History, how they gradually grew into notice, and, at length became equally important with real actions. It is to be lamented that our author passes over with the same silence the redress to be obtained by a writ of error; the practice of which must be collected from authorities of a later period.

[n] Bract. 444. [o] Ibid. 444. b. [p] Vid. ant. 459.

END OF THE FIRST VOLUME.

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